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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1637

THE CITY OF BURBANK, *et al.*,

Appellants,

v.

LOCKHEED AIR TERMINAL, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL BUSINESS AIRCRAFT ASSOCIATION, INC., URGING AFFIRMANCE

PRELIMINARY STATEMENT

Once we recognize that the future is created in large measure by our present decisions, we become aware of our need to recognize that there are alternative futures that we are either helping to achieve or forestalling by our present decisions. For

this reason our decision-making must be based on visions of the world that may be realized and these alternative futures must be developed by a labor of imagination and thought. For this reason, the phrase 'inventing the future' has become current. If we are to have a future of promise rather than threat, we must conceive that future and then develop ways that our institutions can work collectively to bring it out.[1]

Mr. Williams, a futurist of some repute, has set by this quotation the tone and the basis for this presentation by the National Business Aircraft Association, Inc. (NBAA), appearing before this honorable Court as *amicus curiae* pursuant to Rule 42 of the Court's rules.[2]

Issues involving the quality of our environment are hotly debated, and rightly so, for these are life and death issues for judges, pilots, businessmen, airline executives and city officials. Like most environmental issues, the subject of aircraft noise has been the focus of a great deal of concern for all citizens, and especially those who live in and around airports. NBAA and its member companies are no less concerned about aircraft noise.

The predicate for NBAA's participation in this manner will be fully revealed in subsequent presentation and argument. Mr. Williams' cited statement, calling for the exercise of reasoned and cautious judgment does not militate against this concern, but rather, enhances NBAA's plea that this environmental issue of aircraft

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[1] Charles W. Williams, Jr., "Inventing a Future Civilization", *The Futurist*, Vol. VI, No. 4, p. 137, at p. 140.

[2] Consent for this participation was obtained by the National Business Aircraft Association from the primary parties herein. Said consents are submitted with this brief.

noise be handled in accordance with the legislative scheme established by Congress, by those federal agencies empowered to act and develop thoughtful solutions.

The natural reaction of those exposed to the debilitating effects of excessive aircraft noise in the vicinity of airports is to demand curtailment of that noise in any way that brings immediate relief. Such has been the action of the City of Burbank with the passage of Ordinance No. 2216. Rather than allow a leap into a short-term solution in the form of a limitation of hours of operation at airports,[3] it is respectfully urged that the Court permit the public's interest in both noise controls and safety in air commerce be served by the agencies exclusively empowered by Congress to handle these matters: the Federal Aviation Administration and the Environmental Protection Agency.

It is the position of NBAA that a national policy of curtailment of aircraft noise necessitates a uniform and coordinated program. It is further postulated that the program has been proposed and enacted by Congress, and that this legislative scheme and activity thereunder have preempted the field of aircraft noise control. NBAA believes, and would convince the Court, that a hodge-podge of State or local regulation in the form of airport curfews would be destructive of that uniformity required for our safety, and "stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399 (1941).

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[3] Statement of the Hon. Rep. Mikva, Cong. Rec. H. 1534, 92nd Cong 2nd Sess., February 19, 1972.

INTEREST OF THE AMICUS

The National Business Aircraft Association, Inc., is a non-profit corporation, incorporated under the Not-For-Profit Corporation Law of the State of New York. It had its original incorporation in that State in 1947. The Association has its primary offices in Washington, D. C.

As suggested by its title, NBAA is the representative of more than 890 member companies located throughout the United States. In fact, it has membership in 46 States of the continental United States, and the District of Columbia. A reading of the membership of NBAA could be likened to reading Fortune Magazine's list of the nation's 500 largest companies.

The avowed purpose of the Association is to protect and promote the aviation interests of corporations operating aircraft both nationally and internationally as an aid to business, and to foster among them the highest degree of operational efficiency and safety.

The role of business aviation is not widely understood by those outside the business and corporations actually engaged in it. The corporate aircraft is often construed as the private toy for the exclusive pleasure of the chief executives of a large company. Appellants in the instant case demonstrate this view by passing off the statement that—

> The only other flights affected by the ordinance were principally departures (at least three per week) of corporate jet aircraft [R. 389].[1]

The "corporate jet aircraft", or business aircraft as we prefer to call them, based at the Hollywood-Burbank

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[1] Jurisdictional Statement, at p. 9, Appellees, Vol. 1, p. 52.

Airport, are the property of Union Oil Company, Sears & Roebuck, Fluor Corporation, Ambassador College, Cal State Jet Ways, and the Belridge Oil Company.[2] These companies operate equipment such as the Lockheed Jet Star, an aircraft with a cruising speed of 570 mph and a range of 2,450 miles, costing as much as $2,150,000; the Gulfstream II, a jet aircraft manufactured by Grumman Aircraft Corporation, an NBAA member, with a cruising speed of 590 mph, at a cost of $3,400,000; the De Havilland 125, a Hawker-Siddely International, Inc., product, with a cruising speed of 510 mph and a range of 2,060 miles, at a cost of $1,000,000; Lear jets, with cruising speeds up to 508 mph and ranges of about 1,800 miles, costing between $805,000 to $950,000; and Falcons, manufactured in France, sold through Pan American World Airways, Inc., for about $1,600,000, with cruising speeds of 540 mph and a range of about 1,900 miles.[3]

From the foregoing, it is clear to see that the business aircraft based at the Hollywood-Burbank airport have the capability of moving rapidly in interstate commerce, and in international air commerce, for long and uninterrupted flights. Moreover, Union Oil Company has additional fleet aircraft and additional bases at Midland and Houston, Texas, Des Plaines, Illinois, and Lafayette, Louisianna. Sears, a huge and well known corporation, has an aircraft based in Chicago as well.

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[2]Sears, Fluor, and Union Oil are all NBAA members.

[3]Figures developed Table 1, Business Aircraft Specifications, Supplement to Business Aviation Practices, Studies in Business Policy, No. 132, (e) 1970 National Industrial Conference Board, Inc., 845 Third Avenue, New York, New York 10022.

The Hollywood-Burbank airport is only a small example of the extent of business aviation's involvement in interstate commerce. While the scheduled carriers serve about 970 airports across the United States business aircraft can and do serve thousands of the nation's more than 11,000 airports.[4] According to the Department of Transportation, there were 1060 turbojet general aviation[5] aircraft operating in 1972, with an expected increase to 1,145 in 1973 and to 1,227 in 1974.[6] In 1972 there were 790,000 operations by general aviation turbojet aircraft in the United States, with an expected increase to 960,000 operations in 1974.[7] Business aviation constitutes the majority of these aircraft and operations.[8] The total hours flown for business aviation in 1971 totalled 7,119,000 hours, with an average flying time of 1.2 hours[9] per flight. The FAA has forecasted that by 1980, 12.8 million hours will be flown by business aviation operators.

These factors are presented in order to demonstrate the extent of business aviation's involvement in interstate

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[4] Affidavit of Lawrence Bedore, Manager, Airport Services, National Business Aircraft Association, Inc., submitted in *Township of Hanover v. Town of Morristown*, 108 N.J.Super. 461, 261 A.2d 692 (1969), attached here as Exhibit I.

[5] The term general aviation is utilized to describe non-commercial aviation and includes business jets.

[6] Aviation Cost Allocation Study, Working Paper No. 7, Office of Policy Review, Dept. of Transportation, July, 1972, Table B-2, Appendix B.

[7] *Ibid.*, App. C, Table C-1.

[8] Aviation Cost Allocation Study, Working Paper No. 5, Office of Policy Review, Dept. of Transportation, July, 1972, at p. 92.

[9] *Ibid.*, Table 36.

commerce, and the obvious interest of NBAA, on behalf of its membership, in a matter as significant as a locally enacted curfew, that has the implication for broader application as well.

> The sophistication and pace of many business activities today require the use of air transportation for those businesses to remain competitive. Production processes and inventory distribution concepts have changed as a direct result of civil aviation. Today, production stages may be widely separated to optimize skills and minimize costs, while the speed of air transportation helps eliminate large inventories. Speed has also allowed businessmen to increase the sphere and rate of their activities. As a result, it has become practical to decentralize operations and centralize management. The speed, capacity, and flexibility of civil aviation have allowed business to compete more efficiently in an era of rapidly rising costs. Consequently, consumers today are enjoying more products for less cost than would have been possible if business were forced to use pre-World War II air transportation and other methods for movement of people and goods.[10]

Business aviation has come into being as the result of the needs alluded to in the above quotation. The concept of the corporate aircraft as an expensive toy is discounted in today's age of moving executives and corporate employees to and from places that airlines do not reach directly at any time of the day or night.[11] The use of business jet aircraft translates time savings into company profits, and it makes dollars and sense for large,

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[10] Joint NASA-DOT Civil Aviation Research and Development Policy Study, Report, March, 1971, at p. 4-3.

[11] *Ibid.*, at p. 4-7.

multi-state organizations such as Sears and Union Oil, to move its people by company aircraft to cities unserved by air carriers or distant from air carrier airports. The business aircraft also adds flexibility inasmuch as a corporate executive often must attend meetings or make appearances at cities served by air carriers at times when their schedules do not match his.

The flights of business aircraft are regulated by the Federal Government, just as all civil aircraft are regulated. Corporate pilots must meet standards prescribed by the FAA. In most cases, these pilots hold Airline Transport Ratings, but they have no less than a Commercial Pilot's Rating to operate a business aircraft as pilot-in-command.[12] The special status of business aviation has been recognized by the Federal Government by the recent passage of a new Subpart D to Part 91 of the Federal Aviation Regulations, 14 CFR 91D. Under this new Subpart, business aircraft operators are held to a higher standard of care than that class of aircraft users known as "general aviation". One of the reasons for upgrading the regulations was business aircraft themselves. Business jets are as fast and as complex as the jets flown by air carriers. They have similar capability in range. Although the load factors are widely disparate, business jets use the same facilities and require much the same services as do air carriers.

NBAA's membership operating these jet aircraft, by and large, are companies involved heavily in interstate commerce, utilizing the aircraft in other than local flights, and have a real interest in the non-uniform and unregulated employment of curfew from State to State, and locality to locality. The concern hinges primarily on safety factors, but it would be less than candid for NBAA not to admit that there is a real economic interest.

[12] Bedore Affidavit, *supra*.

Excessive congestion at airports is a safety problem. There has been testimony in the Court below that the imposition of local curfew on a less-than-uniform basis would result in additional congestion at times just before curfew, or at airports that did not have curfew.[13] Congestion, of course, easily translates into safety problems.[14] Congestion automatically calls for restricted operations.[15]

> As severe congestions builds around busy terminal areas, the traditional 'first come, first served' of the present air traffic system will have to be abandoned.
>
> The present approach for alloting time and space is workable only if there is excess capacity in the system or if users are willing to accept substantial delays. The problem is compounded because the number of alternate routes is limited and airborne delays cannot be too long. . . .[16]

With curfew-caused congestion, and an alteration of the "first come, first served" method of handling air traffic, business aircraft operators are sure to fall behind the air carriers in the priority established to handle traffic. As such, NBAA's membership have an abiding interest.

Furthermore, the concept of congestion creating safety problems is a matter of concern for pilots of all aircraft, and especially those of jet aircraft. In high speed and high performance jets, things can go wrong suddenly, and

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[13] Appellees App., pp. 213-217, 257-265, 294-295.

[14] *Ibid.*, pp. 264-265.

[15] Joint DOT-NASA Report, Civil Aviation Research and Development Policy Study, March 1971, p. 5-9.

[16] *Ibid.*, Support Papers, p. 3-37.

without warning. This danger is compounded in a crowded sky. Ordinarily highly skilled and competent air traffic controllers may become overburdened due to curfew-caused congestion.

The point to be made is that NBAA is legitimately concerned for the lives on board their members' aircraft, as well as for the lives of those on other aircraft. The basis for the concern is not that there is a curfew, but a curfew that is locally imposed by an organization not equipped or empowered to take into consideration all of the aspects of traffic flow and aviation safety. No party to this matter has contested the fact that the Federal Government has exclusive jurisdiction over the movement and coordination of aircraft from an air safety point of view. Noise curfew has a direct impact on safety, and all aspects of safety - and those things impacting upon it require uniformity and coordination.

Economically, NBAA has a real interest insofar as anticipated congestion, airborne delays, diversion and forced layovers due to curfew will be expensive. There is testimony on the record of the testimony of Mr. Von Kann of the Air Transport Association, Mr. Pyle of the Aviation Development Council of LaGuardia Airport, New York, and Mr. Mitchell of Continental Airlines, with respect to the expense of delays, layover and diversions. They have also testified as to flight cancellations due to time zone changes. Much the same is true with respect to corporation aircraft operations. The benefit of an expensive business tool, at an average operating cost of at least $420.00 an hour[17] whether or not it is in the air, rapidly decreases for each hour it is delayed, diverted or grounded. This translates into economic injury for the operator, and no doubt impacts on profits.

[17] General Aviation Operating Costs, Office of Policy Development, Dept. of Transportation, Feb. 1969.

Uniformity of regulation of our nation's airspace originally gave rise to the need for a single, paramount authority regulating users of the diminishing commodity known as air space, and coordinating usage in the interest of safety.[18] Noise control in the form of curfew not instituted by those charged with considerations of safety as well as environment will create a hazardous circumstance. If locally imposed curfews such as the one before the Court are permitted, a rash of curfews can be expected, and all aviation users will be materially affected with regard to the safety of their operations, as well as the economics involved. NBAA has cooperated with the Federal Government with respect to safety and noise control in the past,[19] and strongly urges that the Court permit EPA and FAA to get on with their Congressionally assigned duties without the well-meaning, though hazardous, interference of State and local authorities.

SUMMARY OF ARGUMENT

I. *Preemption Argument*

A. The imposition of noise regulations with respect to aircraft noise must be carefully imposed by a centralized agency because of the complicated and fragile system of air traffic control in the United States. Coordination and

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[18] S. Rep. No. 1811, Sen. Bill 3880, Federal Aviation Act, of 1958, 85th Cong. 2nd Sess., July 9, 1958, at p. 5.

[19] NBAA has been active in upgrading the safety standards of its membership and took an active role in securing the upgrading of Subpart D to Part 91 of the FARs. NBAA membership recently participated in noise studies at FAA's NAFEC, in New Jersey (data to be released) and were part of DOT's Report of November, 1971, *Measurement and Analyses of Noise From Seventeen Aircraft In Level Flight*, by Carole S. Tanner.

timing between the various elements of the National Air Transport System bespeaks of the necessity for uniformity, in order to ensure that while noise is adequately controlled, safety is not compromised. A noise curfew at a given airport has an immediate impact on air traffic flow at that airport, and has a domino effect on other airports. The result is a change in air traffic flow that places strains upon the regional air traffic system. Noise curfew implemented at more than one airport in a region will impact upon air flow beyond the region. Curfew instituted on an *ad hoc* basis will affect the system nationally. The effect regionally or nationally will be disruptive of requisite uniformity and coordination through delays, diversions and cancellations. As such, curfew is an invasion into a field cloaked with a public interest. It is submitted that this interest is so dominant that the Federal system will be assumed to preclude enforcement of locally originated curfew.

b. In order to demonstrate the extent of the Federal interest in aircraft noise as it relates to safety, one need only turn to the Federal Aviation Act of 1958. The Act and its legislative history are replete with statements demonstrating that Congress intended to fully preempt regulation of navigable airspace with respect to safety. Anything else that affects safety is regulated as well.

Furthermore, from a review of §611 of the Federal Aviation Act, added in 1968 and amended in 1972, as well as its complete legislative history, it emerges as clear that Congress intended to preempt the field of regulation of aircraft noise *per se*, because of the need for centralization. FAA, with responsibility for an overview of the National Air transportation System has been teamed with another Federal agency, the Environmental Protection Agency, to achieve a working compromise

between curtailing aircraft noise and maintaining safety in air commerce.

c. The Congressional scheme of legislation, coupled with the pervasive and thorough regulatory enactments implemented by FAA and the Civil Aeronautics Board, further demonstrates an intention to preempt. In addition, the airport curfew at Burbank, and the airport curfew generally, conflict directly with the regulations of FAA in the noise and safety area, as well as those of CAB in the economic area. The fact that curfew goes beyond the FAA regulations in noise control does not establish its validity. Indeed, where the Federal government preempts a field, supplementary regulations instituted by State or local governments that surpass the Federal enactments are unenforceable.

II. *Burden on Interstate Commerce Argument*

States may, in the exercise of their recognized and legitimate police powers, burden interstate commerce within a framework developed by the Court over the years. The exercise of the State's power must be reasonable and non-discriminatory, and must be directed toward the end sought accomplished. It must operate in an area that has not been specifically or impliedly preempted by Congress, and it may not be in conflict with any Congressional legislation. The action must not disturb required national uniformity, disrupt free passage in navigable waterways, exclude Federally licensed activity, or substantially impede or directly burden the free flow of interstate commerce.

The Burbank Ordinance is directed toward the end sought, noise control, but in a manner that is in substantial conflict with a need for national uniformity.

It is operating within a preempted area, and is on a collision course with several acts of Congress and regulations drawn thereunder. Curfew closes airports to aircraft which are in interstate commerce by virtue of the fact that airports, the airways, and navigable airspace are an aspect of interstate commerce, whether or not used by equipment flown intrastate. With respect to the Burbank situation, there are several interstate air carrier operations, as well as the interstate nature of business aircraft, that are directly affected. The Burbank curfew, or curfew generally closing airports, will exclude a Federally licensed activity.

From the record developed at trial, it is submitted that neither a consideration of the Burbank situation alone, nor a consideration of imposition of regional or national curfew, permits the conclusion that such curfews only incidentally or insubstantially burden interstate commerce. The facts developed at trial demonstrate a substantial economic impact upon the free flow of interstate commerce through the imposition of curfew, whether applied to the instant situation, or generally.

ARGUMENT

POINT I

CONGRESS HAS PREEMPTED THE FIELD OF REGULATION OF ALL NAVIGABLE AIRSPACE, INCLUDING REGULATION OF NOISE IN AND AROUND AIRPORTS.

"It is often a perplexing question", wrote Justice Douglas in 1947,[1] "whether Congress has precluded state action or by the choice of selective regulatory measure has left the police power of the states undisturbed except as the state and federal regulations collide."

Such is the question before the Court in this matter. But the difficulty here extends beyond the interpretation of one Act of Congress and a single scheme of regulations, as in the warehouseman cases.[2] When considering legislation, Federal, State, or local, impacting upon aviation, there must be a consideration of the safety aspects of the legislation, as well as its stated subject matter. In treatment of this matter, therefore, NBAA will attempt to analyze the situation from both the safety and noise aspects, and demonstrate that from both points of view that we are dealing with a "field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of State laws on the same subject."[3]

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[1] *Rice v. Santa Fe. Elevator Corp.* 331 U.S. 218, 67 S. Ct. 1146 (1947), at p. 230, 1152.

[2] See also, *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247, 67 S. Ct. 1160 (1947).

[3] *Rice v. Santa Fe Elevator Corp.*, *supra*, at p. 230, 1152.

A. Tests For Preemption Drawn from the Case Law

We are indebted to his Honor, Judge Matthas, Chief Judge of the Eighth Circuit Court of Appeals, for his highly persuasive decision in *Northern States Power Company v. State of Minnesota,*[4] which will be discussed *infra,* but most of all for his analytical approach in inquiring into a question involving Federal preemption.[5]

In setting forth the tests announced by Chief Judge Matthas, we have changed the order slightly and expanded somewhat in the citation of the case law to provide this Honorable Court with as much of the case law as possible.

The tests NBAA believes applicable to this case are as follows:

1. Considering the aircraft noise aspects of this case and the impact of curfew on aviation safety, has Congress expressly announced in the Statutes involved[6] its supremacy in regulating the area of aircraft noise? If it is found that an expressed intention to preempt this sphere of regulation exists, the Ordinance known as Number 2216, section 20-32.1 of the Burbank Municipal Code, must be found to be an unconstitutional excursion into a field fully occupied by Congress. *Campbell v. Hussey,* 368 U.S. 297, 82 S.Ct. 327 (1961); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 67 S.Ct. 1146 (1947); *Florida Lime and Avocado Growers, Inc. v. Paul,* 373

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[4] 447 F.2d 1143 (8 Cir. 1971).

[5] *Northern States, supra,* pp. 1146 and 1147.

[6] Federal Aviation Act of 1958, as amended, 49 USC 101 *et seq.*; Noise Control Act of 1972, 86 Stat. 1234, P. L. 92-574, 92nd Cong., H.R. 11021, Oct. 27, 1972.

U.S. 132, 83 S.Ct. 1210 (1963); *ALPA v. Quesada*, 276 F.2d 892 (2 Cir. 1960); *American Airlines v. City of Audubon Park*, 297 F.Supp. 207 (DC WD Ky 1968) aff'd *per curiam* 407 F.2d 1306; *cert. denied* 396 U.S. 845 (1969); *American Airlines v. Town of Hempstead*, 398 F.2d 369 (2 Cir. 1968), *cert. denied* 393 U.S. 1017 (1969); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424; 83 S.Ct. 1759 (1963); *U.S. v. City of New Haven*, 447 F.2d 972 (2 Cir. 1971); *In re Veterans Air Express Co.*, 76 F.Supp. 684 (DC NJ 1948); *Pennsylvania v. Nelson*, 350 U.S. 505, 76 S.Ct. 477 (1955); *IUAW v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781 (1950); *Rosenhan v. U.S.*, 131 F.2d 932 (10 Cir. 1942).

2. If there is an announced express intention to preempt the field by Congress, the States cannot exert concommitant or supplementary regulatory authority over the activity that is the subject of the preemption. *Prigg v. Commonwealth of Penna.*, 16 Pet. 539, 10 L.Ed. 1060 (1842); *Charlestown & W.C. R.R. Co. v. Varnille Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915); *Southern R. Co. v. Railroad Com.*, 236 U.S. 439, 35 S.Ct. 304 (1915); *Pennsylvania v. Nelson, supra; Rosenhan v. U.S., supra; Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941); *Napier v. Atlantic Coast Line*, 272 U.S. 605, 47 S.Ct. 207 (1926); *Penna. R. Co. v. PSC of Penna.*, 250 U.S. 566, 40 S.Ct. 36 (1919); *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704 (1971).

In addition, where the intention of the State legislature in legislation is to exercise its police power, and its legislation is in no way intended to interfere with a Congressional action, if the State legislation is in a preempted area, it must fall. *Perez v. Campbell, supra; Minnesota v. Barber*, 136 U.S. 313, 10 S.Ct. 862 (1890).

Furthermore, the Supreme Court has held that even if the State's action has preceded the preempting Congressional legislation, the Court can consider the later drawn statute of Congress that fills the field, and strike down as unconstitutional the prior State action. See *Hines v. Davidowitz, supra*, wherein the Supreme Court considered and found void the prior-passed Pennsylvania Alien Registration Act in light of the Alien Registration Act passed by Congress. Also see *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347 (1941); *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 59 S.Ct. 438 (1939).

3. Where there is an impossibility of compliance with both Federal and State enactment (so-called conflict), a holding of Federal exclusion is inescapable. *Florida Lime and Avocado Growers, Inc., supra; Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438 (1946); *Cloverleaf Butter Co. v. Patterson*, 314 U.S. 148, 62 S.Ct. 491 (1942); *Perez v. Campbell, supra; Rice v. Santa Fe, supra; Colorado Anti-Discrimination Co. v. Continental Airlines*, 372 U.S. 714, 83 S.Ct. 1022 (1963); *American Airlines, Inc. v. Town of Hempstead, supra; Allegheny Airlines v. Cedarhurst*, 238 F.2d 812 (2 Cir. 1956); *Castle v. Hays Freight Lines*, 348 U.S. 61, 75 S.Ct. 191 (1954); *Huron Portland Cement Co. v. Detroit*,[7] 362 U.S. 440, 80 S.Ct. 813 (1960); *Kelly v. Washington*, 302 U.S. 1, 58 S.Ct. 87 (1937); *Hill v. Florida*, 325 U.S. 538, 65 S.Ct. 1373 (1945); *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1323 (1963); *U.S. v. New Haven, supra; Gibbons v. Ogden*, 22 U.S. 1 (1824).

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[7]The *Huron* case is relied upon substantially by Appellants. It will be demonstrated *infra* that it is not controlling of the issue at hand but is in fact supportive of Federal preemption in this situation.

4. Where there is neither announced preemption, nor a direct conflict, the Court has examined the circumstances of the cases and determined whether or not there is an implied Federal preemption. *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 67 S.Ct. 1026 (1947); *Napier v. Atlantic Coast Line, supra; Castle v. Hays Freight Lines, supra; Campbell v. Hussey, supra; Rice v. Santa Fe, supra; Florida Lime and Avocado Growers v. Paul, supra; Hines v. Davidowitz, supra.*

Judge Matthas tells us that there are four major questions to be asked in implying preemption:

(a) Is an aim and intention on the part of Congress to occupy the field revealed by the legislative history of the Federal enactment? *Florida Lime and Avocado Growers, supra; Campbell v. Hussey, supra; Rice v. Santa Fe, supra.*

(b) Is the Federal regulatory scheme so persuasive as to represent an intention to preempt the field? *Pennsylvania v. Nelson, supra; Bethlehem Steel v. N.Y. State Labor Relations Board, supra.*

(c) Is the subject matter involved one that demands exclusiveness of Federal regulation in order to achieve uniformity vital to the national interest? *Florida Lime and Avocado Growers, supra; Campbell v. Hussey, supra; Huron Portland Cement Co. v. Detroit, supra; Northern States Power Co. v. Minnesota, supra; American Airlines v. City of Audubon Park, supra; Colorado Anti-Discrimination Com. v. Continental Airlines, supra; American Airlines v. Hempstead, supra; Head v. N.M. Board of Examiners, supra; Hines v. Davidowitz, supra; Udall v. FPC*, 387 U.S. 428, 87 S.Ct. 1712 (1967); *Allen-Bradley Local No. 1111 v. Wisconsin E.R. Board*, 315 U.S. 740, 62 S.Ct. 820 (1942); *Cloverleaf Butter v. Patterson, supra; Penna. R. Co. v. PSC of Penna.*, 250

U.S. 566, 40 S.Ct. 36 (1919); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510 (1938); *Kelly v. Washington, supra; N.Y. Central R. Co. v. Winfield*, 244 U.S. 147, 37 S.Ct. 546 (1917); *Townscend v. Yeomans*, 301 U.S. 441, 57 S.Ct. 842 (1937); *Southern Pac. Co. v. State of Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945); *California v. Zook*, 336 U.S. 725, 69 S.Ct. 841 (1949); *Local 174 v. Lucas Flour Co.* 369 U.S. 105, 82 S.Ct. 571 (1962); *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050 (1946); *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729 (1913); *Cooley v. Board of Wardens*, 53 U.S. 298 (1851).

(d) The last test to be applied under this heading of implied preemption is whether the law enacted by the State stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz, supra; American Airlines v. Hempstead, supra; Florida Lime and Avocado Growers, Inc., supra; Gibbons v. Ogden, supra.*

We will turn now to a consideration of these tests, applying case law, statutory language, legislative history, or Federal regulation as applicable. The methodology of the approach will be to treat each test from the point of the impact of aircraft noise curfew upon the overriding concern for aviation safety, as well as from the aspect of the Noise Act of 1972, *per se.* This approach, by necessity, will involve some duplication in effort that, for the sake of clarity, is unfortunately unavoidable.

B. Discussion of Tests for Preemption as Applied to this Case

(1) Test (1)—Congress has fully expressed its intention to regulate all activity involving navigable airspace, from a safety point of view. Curfew ordinances affect navigable

airspace and impact upon aviation safety and are therefore operating within a preempted area.

We have stated in an earlier part of this brief that there is a positive relationship between safety and the control of aircraft noise in the vicinity of airports through curfew. It is obvious that a curtailment of travel through navigable airspace has an impact upon such travel. From the safety aspect it is less obvious that a single incidence of curfew would have an impact upon safety. It was explained, though, in the Court below and in our preliminary statement, that curfew, if broadly enacted across the continental United States, would cause delays, cancellations and diversions of flights. The cancellation of flights impacts economically. Delays and diversions not only impact economically, but present a safety problem of considerable magnitude.

It has been argued below, and will no doubt be argued at this level, that the institution of a single curfew at a "neighborhood" airport at Burbank is at issue, not a broadly and inharmoniously enacted curfew. That curfew on the local level is waiting in the shadows is evidenced by frustrations that brought about this case, the Morristown[1] decision, and the Williams[2] case in Arizona. This Court, as did the District Court below, can and should consider the ramifications of locally imposed curfew, as its decision herein will be utilized in a flood of local curfew cases should the Courts below be reversed.

Taking into consideration matters that naturally flow from circumstances such as those involved here would

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[1] *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969).

[2] *Williams v. Superior Court of Arizona*, ___P.2d ___, Ariz. Sup. Ct., 1972, vacating 489 P.2d 854 (1971).

not be a proceeding strange to the Court. In *Southern Pacific Co. v. Arizona,*[3] a case that dealt with the assertion of the State of Arizona that it was within its police power to regulate the length of freight trains passing through the State as a safety measure,[4] the Court considered the States surrounding Arizona, and the ramifications of each State instituting a different set of rules regulating the length of trains. The potential for delays, the costs of additional manpower, equipment and possible inconvenience were all taken into account, although the only regulation before the Court was that of the State of Arizona. In *Udall v. FPC,*[5] the Court undertook to postulate a hypothesis in discussing the ramifications of the case before it, the construction of a dam at High Mountain Sheep. Mr. Justice Douglas, writing for the Court, stated:

> Timed releases of stored water at High Mountain Sheep may affect navigability; they may affect hydroelectric production of the downstream dams when the river level is too low for the generators to be operated at maximum capacity; they may affect irrigation; and they may protect salmon runs when the water downstream is too hot or insufficiently oxygenated. At p. 435,1716.

The Court thus reached into the ramifications of Federal versus local control, which the Court found "may conceivably make a vast difference in the functioning of the vast river complex." At p. 435,1716.

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[3]325 U.S. 761, 65 S. Ct. 1515 (1945).

[4]The statute was held to be a substantial burden on interstate commerce and thence unconstitutional.

[5]387 U.S. 428, 87 S. Ct. 1712 (1967).

Similar exercises were involved in *Local 174 v. Lucas Flour*,[6] where the potential uncertainty of different meanings of labor contract terms under Federal and State laws was a possibility that was considered, and in *Bibb v. Navajo Freight Lines*,[7] where the difference of standards between the States of Arkansas and Illinois for rear fender mudguards on trucks was cited in a case involving Illinois standards.[8]

That delays in flight or diversions create a safety problem is clear from a reading of the case of *American Airlines v. Town of Hempstead*.[9] In the *Hempstead* case the Town passed a noise ordinance due to jet noise from JFK International Airport. While the Court found that the noise levels were incompatible with sleep, religious services, entertainment, conversation, classroom activities, and were a source of distraction and discomfort, it was likewise found that the ordinance was operating in a preempted sphere, and would not be allowed to stand. It was further found that the ordinance would be determinative of flight patterns and procedures incompatible with those extant at JFK Airport, and that a redesigning of those procedures would not be compatible with preservation of safety margins without impairing the traffic handling capacity of the airport. The ordinance

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[6] 369 U.S. 105, 82 S. Ct. 571 (1962).

[7] 359 U.S. 521, 79 S. Ct. 962 (1959).

[8] Also see *Crandell v. Nevada*, 6 Wall. 35, 18 L. Ed. 745 (1868), where the Court made the following statement: "But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one state can do this so can every other state. And thus, one or more states covering the only practicable routes of travel from east to west, or from north to south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."

[9] 398 F.2d 369 (2 Cir. 1968), *Cert. denied* 393 U.S. 1017 (1969).

fell not because it was incompatible as a noise standard with a Federal enactment, but rather, because the ordinance would necessitate the creation of an unsafe condition at the airport.

Now that the implications for safety due to a locally imposed noise regulation through curfew have been established, a short trip through the Federal Aviation Act of 1958, its legislative history, and some more of the case law will establish the fact that Congress has fully preempted the field of aviation safety and all that touches it.

a. The Face of the Act.

The Federal Aviation Act of 1958 was the product of a need for a unified regulatory body, acting in the interest of aviation safety. The need was brought on by an air traffic control crisis that could be directly traced to a highly decentralized system, which permitted several government agencies and arms of the military to exercise a degree of control over air traffic.[10] This lack of coordination culminated in air disasters, a mid-air collision of two heavily laden airliners in the Grand Canyon area, as well as mid-air accidents between military jets and civilian aircraft over Las Vegas, Nevada, and at Brunswick, Maryland.[11]

President Eisenhower, writing on June 13, 1958, to the Subcommittee of Aviation, Senate Committee on Interstate and Foreign Commerce, recognized that a lack

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[10] S. Rep No. 1811, Committee on Interstate and Foreign Commerce, accompanying S. 3880, Federal Aviation Act of 1958, 85th Cong. 2nd Sess. July 9, 1958.

[11] *Ibid.*, at pp. 7-8.

of coordination between the multiple agencies involved in air transportation regulation was in large measure responsible for a breakdown in safety, and accordingly recommended that S.3880 be promptly reported out of Committee.[12]

With the need established, S.3880 was produced, and hearings upon it were begun and completed in hurried sessions.[13] The Federal Aviation Act of 1958 was born.

On the face of the Act, without delving into the legislative history, one can clearly see that the Administrator of the FAA was given broad and exclusive powers. Section 103 of the Act, 49 USC 1303, provides that the Administrator shall have the power to regulate air commerce "in such manner as to best promote its development and safety . . ."; to promote and encourage the development of civil aviation; to consider research and development with respect to the operation of air navigation facilities, as well as their installation and operation; to develop a "common system of air traffic control and navigation for both military and civil aircraft; and "to control the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of safety and efficiency of both."

Section 104 of the Act, 47 USC 1304, declares as national policy the public right of freedom of transit through the navigable airspace of the United States.

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[12] Hearings, Subcommittee on Aviation, Sen. Committee on Interstate and Foreign Commerce, 85th Cong. 2nd Sess., S. 3880, June 16, 1958, at pp. 145-146. Also see *ALPA v. Quesada*, 276 F2d 892 (2 Cir. 1960), for an outline of the legislative history on this point.

[13] *Ibid.*, at pp. 59, 264.

In Sections 307(a) and (c), 47 USC 1348(a) and (c), the Administrator's powers are further spelled out with respect to use of airspace.

Use of Airspace

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest. [49 USC 1348(c)]

Air Traffic Rules

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground and for the efficient utilization of the navigable airspace including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles and between aircraft and airborne objects. [49 USC 1348(c)]

In Section 313(a), 49 USC 1354(a), the Administrator of FAA is given broad powers to carry out his duties. It is herein stated that–

The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of

this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act.

He is also given power with respect to air navigation facilities. Section 606 of the Act, 49 USC 1426, states:

Air Navigation Facility Rating

The Administrator is empowered to inspect, classify, and rate any air navigation facility available for the use of civil aircraft, as to its suitability for such use. The Administrator is empowered to issue a certificate for any such air navigation facility.

In implementing Sections 307(a) and (c), and Section 313(a), the FAA has defined air traffic and air traffic control in 14 CFR 1.1. "Air traffic", according to the regulations, "means aircraft operating in the air or on an airport surface, exclusive of loading ramps and parking areas." "Air traffic control" has been defined as a "service operated by appropriate authority to promote the safe, orderly and expeditious flow of air traffic."

From the foregoing, NBAA believes it safe to say that there are no words of limitation in any of the empowering sections of the face of the Act that would detract from the concept that Congress has intended to pervade the field of aircraft safety regulation. From FAA's definition of air traffic, it is clear that the Administrator has exclusive control over aircraft on the ground, preparing for take off, and after take-off, as well as in the air. Indeed, this concept is supported by Section 101(32) of the Act, 49 USC 1301(32), wherein it is stated that–

an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

b. Legislative History of the Act.

NBAA would convince the Court that the search need go no further than the face of the Act, but recognizing that a more thorough analysis is called for by this most important case, we respectfully direct the Court's attention to the legislative history of the Act on the subject of Congress' intention to preempt the area of regulation of navigable airspace.

Senator Monroney, writing for the Aviation Subcommittee, made it clear at the outset that Congress intended to establish a paramount authority in the regulation of navigable airspace. He states that the Administrator of FAA–

> Would be charged with the management of the national airspace. . . .[14]

Further along Senator Monroney points out that–

> Aviation is unique among transportation industries in its relation to the Federal Government–it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities.[15]

He goes on to state that–

> Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.[16]

Senator Monroney recognized the need for an independent FAA, "with plenary authority over the Nation's airspace. . . ."[17] Assuming that the Senator's

[14] *Op. Cit.*, S. Report No. 1811, at p. 1.

[15] *Ibid.*, at p. 5.

[16] *Ibid.*, at p. 5.

[17] *Ibid.*, at p. 7.

vocabulary is standard, Webster defines "plenary" as: full, entire, complete. It is clear, therefore, that Congress intended itself to have complete and exclusive control over the Nation's airspace.

The Committee Report does not rest there. It goes on to provide that–

> The present legislation proposes to clear away this ambiguity once and for all by vesting *unquestionable* authority for *all aspects* of airspace management in the Administrator of the new agency. . . .
>
> The Administrator is given *plenary* authority in the matter of air traffic rules, as well as for the development and operation of air navigation facilities.[18] [Emphasis supplied.]

The Senate and the House held hearings on the Act. In the midst of the Senate Hearings, President Eisenhower, as noted previously, sent a message to the Senate Subcommittee. In his message, the President stated:

> I recommend that the Federal Aviation Agency be given full and paramount authority over the use by aircraft of airspace over the United States and its Territories. . . .[19]

The Senate and the House Hearings saw the same people making presentations, carrying the same themes. The main theme was the need for a single, unified, omnipotent Federal agency, subject only to the President and the Courts, regulating airspace completely, including that airspace in and around airports from the air traffic point of view.[20] Industry was of the same view. Stuart

[18] *Ibid.*, at pp. 14, 15.

[19] *Op. Cit.*, Hearings on S. 3880, at p. 148.

[20] Hearings, House Subcommittee on Interstate and Foreign Commerce, on H.R. 12616 (Federal Aviation Act of 1958) 85th Cong. 2nd Sess., June and July 1958, at pp. 193, 253. *Op. Cit.*, Hearings on S. 3380, at pp. 2, 23, 27, 28, and 29.

Tipton, speaking for the airline industry at the Senate Hearings, maintained this view, and asserted that, in the interests of safety, one administrator must have control over all the airspace of the country.[21]

Mr. E. Thomas Burnard, Executive Director of the Airport Operators Council, stated:

> The whole system of air traffic control and airway capacity . . . begins and ends at an airport. Without the precise and complete control of both military and civil aircraft on and in the vicinity of our great metropolitan airports, as well as on the airways, tragedy can occur again. And without the integrated planning of airport capacity with airway capacity, the improvement of one without the other will create an unacceptable balance.[22]

Senator Monroney, in response to some points raised by Mr. Burnard concerning regulation of airspace with respect to the ground thereunder, stated:

> We do not want to overlook anything as important as proper jurisdiction over ground areas, or approaches to ground areas that aircraft must use, as well as the airspace above them.[23]

David H. Baker, President of Capitol Airlines, Inc., further emphasized the exclusivity of Congressional action in the regulation of airspace:

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[21] *Op. Cit.*, Hearings on S. 3880, at p. 39.

[22] *Ibid.*, at p. 51. It is interesting to note that the present airport operators council international, at Section 730 of its current policy handbook, makes the statement that "disruption of airport operations through a nighttime curfew is strongly opposed."

[23] *Ibid.*, at p. 59.

> The need for clear cut and single responsibility in control of airspace requires that the Federal Aviation Act of 1958 be adopted with the utmost speed.[24]

Clifford P. Burton, speaking for the Nation's air traffic controllers, was of the opinion that in the interest of safety all responsibility for rulemaking pertinent to air traffic should be lodged in a single agency, and that—

> The agency should have final authority on the allocation of airspace, location of airports, designation of airways or air routes, control zones, control areas, and the establishment of airspace reservations and restricted area.[25]

A.B. McMullen, Executive Director of the National Association of State Aviation officials was concerned about the absolute preemption intended by the Act.[26] He therefore proposed the following mandatory language:

> *That nothing in the act shall be deemed to abrogate the right and responsibility of the several States to protect, under their police power, the welfare and safety of their inhabitants.*[27] [Emphasis supplied.]

This language does not appear in the Act as passed by Congress. Senator Monroney avoided commentary upon it, although he did refer to "close cooperation with state agencies on the matter of airplane plans and airport construction."[28] It can fairly be implied that since language proposed by Mr. McMullen did not appear in the

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[24] *Ibid.*, at p. 81.

[25] *Ibid.*, at p. 121.

[26] *Ibid.*, at p. 136.

[27] *Ibid.*, at p. 137.

[28] *Ibid.*, at p. 742.

final draft of the Act, it was rejected. To reserve power in the States, under their police power, was not the intention of Congress.

General E.R. Quesada, Chairman of the Airways Modernization Board (and the first Administrator of FAA), speaking for the Administration stated that–

> The new agency must be given *full* and paramount authority over allocation and use of airspace by aircraft both civil and military.[29]

Mr. James T. Pyle, Administrator of the Civil Aeronautics Authority, soon to become Deputy Administrator of the FAA, stated:

> . . . [A]ir safety rules apply almost across the board. Any regulation that is issued in some way or other affects the safety of the use of airspace.[30]

During the Senate Hearings, testimony was received from Malcom A. MacIntyre, Under Secretary of the Air Force. On the subject of airport development, Senator Monroney, in response to a statement by Mr. MacIntyre, stated:

> Of course the Administrator has an absolute right to withhold Federal funds from the Federal aid to airports. The section you are quoting is where the private person goes out with private funds to build [an airport]. *We can't stop them from building one but we can stop them from using it.* [Emphasis supplied.]

Mr. MacIntyre rejoined:

> As a practical matter we can't stop the Port of New York Authority either if it chooses to use its own money and change its airport layout.

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[29] *Ibid.*, at p. 151.

[30] *Ibid.*, at p. 236.

To which Senator Monroney replied:

> The Administrator of the Federal Aviation Agency can deny the entrance of flights from that airport into the airways system. He can prohibit air traffic. They might build the field but they sure couldn't use it. . . .

Mr. MacIntyre:

> I am not sure that you could deny the airspace to anybody unless you wrote it in the bill.

Senator Monroney's reply is clear on the point of preemption. He said:

> This [the Act] gives the Administrator control over the airspace, therefore he has the right to do just that. We don't have control over the ground space. Persons can build anywhere they wish. As I read the Act, I think they could still build ground facilities but they wouldn't necessarily be able to get a plane off into the air.
>
> * * * * *
>
> Certainly that is the intent of the Act, and while we didn't assume control of the ground we would control the airspace.[31]

Stronger language than that cited above is not necessary to further support the concept posited in this heading.[32]

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[31] *Ibid.*, at p. 279.

[32] *Ibid.*, at pp. 333, 334.

c. Court Action Concerning Federal Premption of Airspace

The lower Federal Courts have uniformly handled this question of Federal preemption of navigable airspace in a manner analogous to the above discussion. *American Airlines v. City of Audubon Park*, 297 F. Supp. 207 (DC WD Ky. 1968), aff'd *per curiam* 407 F.2d 1306; *ALPA v. Quesada, supra; American Airlines v. Hempstead, supra; In re Veterans Air Express Co.*, 76 F. Supp. 684 (DC N.J.1948); *U. S. v. City of New Haven*, 447 F.2d 972 (2 Cir. 1971); *Rosenhan v. U. S.*, 131 F.2d 932 (10 Cir. 1943).

One case has reached this Court in the area of Federal sovereignty over the navigable airspace. The case dealt with the predecessor to the 1958 Act, the Civil Aeronautics Act of 1938. See *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U. S. 590, 74 S. Ct. 757 (1954).

The *Braniff* case probably rightly decided that the State of Nebraska could properly levy an *ad valorem* personal property tax on flight equipment operated by Braniff within the state. The opinion, however, handles the argument made by Braniff in the area of Federal sovereignty over national airspace in a remarkable manner. Braniff argued that, since it was regulated by the Federal Government, it could not be taxed by the State. The Court found that the language of the Civil Aeronautics Act did not establish a preemption of control of navigable airspace, but rather asserted an exclusive national sovereignty over the airspace of the limited States. *Braniff, supra*, at pp. 594-596. This sovereignty was held to be exclusive insofar as it applied to foreign governments, but the Act "did not expressly

exclude the sovereign powers of the states." *Braniff supra*, at p. 595.

The 1938 Act is a far cry from the 1958 Act and its legislative history analyzed, *supra*. It is NBAA's belief that the *Braniff* case is of no precedental value since the passage of the 1958 Act, and must be relegated to its place in history. The 1958 Act does not speak in terms of sovereignty but rather in terms of control, paramount authority, plenary authority, and the like. The language recommended by the States through Mr. McMullen of NASAO, *supra*, designed to insure the States of their "sovereignty," was soundly rejected in the enactment of the 1958 Act. *Braniff* is not cited with favor in any of the more recent lower Court holdings. We urge that it have no positive place in this consideration.

On the issue of preemption, some would point to *AOPA v. Port Authority of N. Y.*, 305 F. Supp. 93 (DC ED N.Y. 1969), and *Port Authority of N. Y. v. Eastern Airlines*, 259 F. Supp. 745 (DC ED 1966), and argue that a weakening in the preemptive scheme of the 1958 Act is demonstrated. The Court found in both cases that the FAA did not oppose the Port Authority in levying its fees, and that no conflict with the Federal scheme existed. Rather than resulting in an interference with the safety function, the imposition of the fee schedule was of enhancing effect. The action of the Port Authority, created by a Pact between the States of New York and New Jersey with Congressional approval, did not stand as an obstacle to the execution of a Federal scheme of activity. *Hines v. Davidowitz, supra.*

These lower Court decisions are of limited value to either side of the issue. On the one hand, they are not representative of even a minor weakening in the

preemptive nature of congressional intention in the area of airspace regulation. On the other, the destiny of the cases had they proceeded further to the Second Circuit Court of Appeals is in question. From the legislative history cited herein, NBAA has more than a little doubt as to the wisdom of the lower Courts' decisions in these two cases.

Appellants will no doubt argue that the Federal Aviation Act itself does not contain strong preemptive language. In fact, they may say that the language contained in the Act is in no way preemptive, and cite Section 1106, 49 USC 1506, which states:

Remedies Not Exclusive

> Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the Act are in addition to such remedies.

It is important to note that this section addresses itself to remedies exclusively. The section has been interpreted as permitting actions in State courts on contracts concerning aircraft, commercial matters, and aircraft torts. A Federal tort action has not been created by way of the enactment of the Act. *Porter v. South Eastern Aviation, Inc.*, 191 F. Supp. 42 (DC MD Tenn. 1961). *Rosdail v. Western Aviation Inc.*, 297 F. Supp. 681 (DC Colo. 1969); *Colonial Airlines, Inc. v. Janas*, 202 F.2d 914 (2 Cir. 1953) (interpreting language in the 1938 Act identical to that employed in the 1958 Act): *Mack v. Eastern Airlines, Inc.*, 87 F. Supp. 113 (DC Mass. 1949) (interpreting the identical language in the 1938 Act).

As a final point under this heading, we direct our attention to Appellants' statement in their Jurisdictional Statement concerning the case of *Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531 (1962).[33] Appellants

[33] Pp. 14, 15, 16 of Appellants' Jurisdictional Statement.

claim that if this Court finds an absolute preemption intended by Congress, a review of the *Griggs* case is in order. Appellants hereby attempt to raise the bugaboo of massive governmental pay-offs for noise "taking" in and around the area of airports, should it be found that FAA, acting for Congress, has plenary authority in the regulation of airspace.

It is submitted that Justice Douglas, writing for the Court in *Griggs*, in no way limited the Government's paramount control over *safety* in the decision. It is further submitted that the case dealt with a "taking" problem, and the Administrator of FAA, in prescribing regulations in controlling airspace from a safety point of view at the locality selected by the airport operator, is not involved in any taking. The airport operator, in order to obtain Federal participation, must himself "take" and pay just compensation for all the land necessary to insure safe operations at the airport. A holding in this Court that the Administrator, acting for Congress, is the paramount authority with respect to the safety of all flights in navigable airspace would not disturb the holding in *Griggs, supra*, in any way. Since noise regulations impact upon safety standards, it must also be concluded that the Administrator's implementation of noise standards would likewise be divorced from "taking" considerations. "Taking" and supreme authority in regulating safety in air commerce are by no means identical. If this were not so, every enactment of Federal safety legislation would result in a "taking" of one form or another.

NBAA submits that the Federal Aviation Act of 1958, considered under test one, clearly establishes that safety in flight is the exclusive domain of the Federal Government. Since airport curfew has an impact upon

safety, it is a logical conclusion that locally imposed curfew would operate in a preempted area.

2) Tests (2) and (3)—Compliance with locally imposed airport curfew would collide directly with Federally imposed safety standards, and with the authority of the Civil Aeronautics Board. Supplementary regulation on the part of Burbank may not stand.

We have expended a considerable amount of words at this point in arguing that locally imposed curfew ordinances such as the one in issue would create a havoc with respect to the flow of air commerce. It is plain that we do not have an actual conflict situation here with respect to forthcoming Federal noise regulations, since those have not yet been enacted. What we have, as argued before, is a mandate by a local authority that impinges upon a nationally enacted Federal scheme of air commerce, and herein lies the conflict.[1]

That the conflict is not head-on is not of paramount concern. We have stated before that noise ordinances of this sort are direct safety ordinances. *American Airlines v. Town of Hempstead, supra.* Furthermore, a conflict can be once removed from direct confrontation, as in *Perez v. Campbell*, 402 U. S. 637, 91 S. Ct. 1704 (1971).

In *Perez, supra*, an action was brought in a Federal District Court in Arizona for an injunction and a declaratory judgment, declaring a section of the Arizona Motor Vehicle Safety Responsibility Act unconstitutional. After the District Court dismissed, and the Court of Appeals affirmed, 421 F.2d 619, this Court reversed

[1] FAA has some noise regulations in the form of regulation in the form of regulation of noise at the source, 14 CFR Part 36, and in locally oriented preferential runway system. These items will be discussed under test (4).

and remanded. The Court of Appeals rested its opinion upon the cases of *Kessler v. Dept. of Public Safety*, 369 U. S. 153, 82 S. Ct. 807 (1962), and *Reitz v. Mealey*, 314 U.S. 33, 62 S.Ct. 24 (1941). In *Kessler* and *Reitz*, financial responsibility laws were considered to be within the police power of the state, even though they conflicted with the Federal Bankruptcy Act. This Court, in reversing, considered *Kessler* and *Reitz* to be "aberrational doctrine."

The facts which the Court considered in *Perez* were as follows: The Arizona statute required that a driver who suffers a judgment due to an automobile accident will lose his driver's privileges until he demonstrates financial responsibility or satisfies the judgment. While a statute such as this appears to be entirely local in nature, the matter becomes complicated when the driver declares personal bankruptcy and is discharged in bankruptcy with respect to the judgment, for while the obligation to pay the judgment may be gone, the driver's road privileges are still suspended under the Arizona Act. The question before Mr. Justice White and this Court was whether the Arizona statute was in conflict with the Bankruptcy Act of the United States.

Mr. Justice White, writing for the Court, stated that he viewed the Court's obligation in a conflict case to ascertain the construction of the two Acts involved, and to determine whether any conflict exists. He wrote, citing *Hines v. Davidowitz, supra*, that in the final analysis the Court's function is to determine whether a challenged State statute "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[2]

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[2] Also see *Castle v. Hays Freight Lines*, 348 U.S. 61, 75 S. Ct. 191 (1954).

If a conflict exists in any way, the Federal scheme must prevail, even though it may be a more modest, less pervasive plan than that of the State. *Rice v. Santa Fe, supra; Napier v. Atlantic Coast Line,* 272 U.S. 605, 47 S.Ct. 207 (1926).

It has been stated, on the subject of conflict, that–

> The test of whether both Federal and State regulations may operate, or the state must give way, is whether both regulations can be enforced without impairing the Federal superintendence of the field, not whether they are aimed at similar or different objectives. *Florida Lime and Avocado Growers Association, supra.*, at p. 142, 1217.

It would be a vain act for Appellants to argue that the noise ordinance is not a safety ordinance, for it undoubtedly affects safety. Even if it were accepted, *arguendo*, that the noise ordinance was aimed at a different area of regulation, it would be an impotent argument. *Napier v. Atlantic Coast Line, supra; Pennsylvania R. Co. v. PSC of Pennsylvania,* 250 U.S. 566, 40 S. Ct. 36 (1919).

Nor would it be worthwhile for Appellant to argue that the Burbank Ordinance is supplementary to the Federal scheme. If there is an intention to preempt the field on the part of Congress, supplementary regulation on the part of State or local governments may not be credited. *Prigg v. Pennsylvania,* 16 Pet. 539, 10 L. Ed. 1060 (1842); *Charlestown and W. C. R. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 35 S. Ct. 715 (1915).

Because of the widespread impact of curfew on aircraft operations, Appellant may not be heard to argue that the ordinance is of a local nature, that the problem is one indigenous to Burbank and that Congress may

reasonably be expected never to deal with it. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510 (1938).

Addressing ourselves, therefore, to establishing that this conflict exists, we turn to an examination of the National Air Transportation System first, and secondly to the direct conflict between curfew and the Federal Aviation Act of 1958, as it applies to the Civil Aeronautics Board.

Mr. Clifton F. Von Kann, Vice President of the Airline Transport Association, testified at the trial below with respect to the National Air Transportation System or NAS.[3] He testified that the NAS is comprised of the ground system or the airport complex, the airway system, which directly involves the air traffic control system, and the fleet of aircraft operating in airspace. Regulation of this system is split between FAA, in the safety area, and the CAB in the area of routes, schedules and economics.

Mr. Benjamin L. Freiman, Chief of the Los Angeles Air Traffic Control Center, was called at the trial below to discuss the concept of air traffic flow,[4] an important element of the NAS. His operation at the Center handles about 3,000 aircraft a day, in an area extending toward the South to the U. S.–Mexican border, toward the East to the Colorado River, toward the North to mid-California, and about 150 miles seaward toward the West. The area covers 184,000 square miles.[5] The objective of the Center is the safe and expeditious utilization of airspace.[6] He testified with respect to a step-by-step

[3] Appellees Appendix, p. 257.

[4] Appellees App., p. 186 *et seq.*

[5] *Ibid.*, p. 187.

[6] *Ibid.*, p. 188.

instrument flight through the area regulated by the Center.[7] The description includes the necessities for flight separation, both vertically and horizontally, time spacing, routing, and passing the aircraft from tower to control center to tower. The scheme becomes more complex the longer the distance, the greater the duration of the flight, and the more aircraft in the air. All these concepts are involved in flow control.[8] Flow control is a specialty within a Center,[9] and special teams are assigned to its various aspects. Flow control has become such an important part of NAS that a centralized scheme or flow control plan has been established by FAA in Washington. The Washington Flow Control Center is charged with the responsibility of alleviating airway saturation at peak periods, and coordinating the air traffic system.[10]

From this analysis on the record, it must be readily apparent that a very complex, coordinated and fragile system is at work. A breakdown at any time may well cause a hazardous situation. Congestion no doubt causes delays and diversions. Curfew, unless integrated into this flow control system, and the National Air Transportation System, must undoubtedly be as frustrating to the end of safety as congestion and delay. Locally imposed curfew would be an impairment to a well-structured system of Federal superintendence, and thence represent a real conflict.

Turning next to a consideration of the impact of curfew upon the area of authority exclusively left in the

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[7] *Ibid.*, pp. 189-192.

[8] *Ibid.*, p. 193.

[9] *Ibid.*, p. 194.

[10] *Ibid.*, p. 195.

capable hands of the Civil Aeronautics Board, we would remind the Court that NBAA's membership is not regulated by the Board, but by FAA. Since the question of conflict has no boundaries, we did not feel compelled to limit arguments solely to NBAA's areas of operations.

There were exhibits and testimony in the Court below concerning the role of the CAB. There is no question that the CAB is paramount with respect to regulation of the economic aspects of interstate air transportation. The CAB was established as plenary authority in this area in 1938, and the 1958 Act did not change its status.[11]

The CAB certificates all interstate air transportation, 49 USC 1371(a). It regulates all schedules, routes, equipment utilized, and airports utilized, 49 USC 1371(e). No part of the certificate of an air carrier may be modified in any of these respects without Board approval, 49 USC 1371(g). These powers apply to regularly scheduled carriers, as well as supplemental carriers, 49 USC 1371(n). Foreign air carriers are regulated by the Board as well, with respect to their operations on U. S. soil or in U.S. airspace, 49 USC 1372. The rates charged by air carriers are regulated, 49 USC 1373. The Board is empowered to inquire into air carrier management, 49 USC 1385, and issue exemptions from its regulations, 49 USC 1386. In carrying out its assigned duties, the CAB has enacted a comprehensive scheme of regulations, 14 CFR 200-399.110.

Curfew at Burbank would be in direct conflict with the Board's authority. United Air Lines, Western Airlines, Air West, and Continental Airlines all use the

[11] S. Rep. No. 1811, Senate Committee on Interstate and Foreign Commerce, accompanying S. 3880, 85th Cong. 2nd Sess., July 9, 1958.

Hollywood-Burbank Airport for regularly scheduled flights, and as an alternate airport to Los Angeles airport when weather conditions there require it. These airlines are regulated by the Civil Aeronautics Board as described, *supra*. It is patently absurd to assume that, should any or all of these airlines approach the CAB with a request to institute a flight after 1:00 P.M. or before 7:00 A.M., the curfew hours, the Board would consider itself bound by the Burbank Ordinance. Burbank may no more regulate this aspect of airline economics than it may approve a tarrif schedule for United, or sanction the merger of Continental with Western.

Appellant would point to the case of *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440, 80 S. Ct. 813 (1960), claiming that no conflict exists in the instant case, and base this claim on circumstances in *Huron* considered to be factually similar to this case. The Courts below have distinguished *Huron*.

In *Huron* the constitutional validity of certain of Detroit's Smoke Abatement Code was drawn into issue. The case therefore dealt with an environmental issue, as does this one. Appellants therein were owners of a fleet of transport vessels operating on the Great Lakes. Two of their vessels were equipped with fired Scotch marine boilers, which had to be fired up and cleaned periodically while the vessels were docked so as to keep deck machinery operative. When the fires were cleaned, smoke emissions from the boilers violated the maximum density permitted under the Detroit Code. The parallel between that situation and this is obvious. While taking off and landing, aircraft at Hollywood-Burbank aircraft may exceed the tolerances of the community, and led to the enactment of a curfew.

There all similarity ends. Instead of a curfew, the owners of the boats were subjected to criminal sanction. The Court found that the Detroit Code was a legitimate exercise of police power. The exercise of this power was not found to be without the limitations imposed thereupon by the Courts.

In discussing these limitations, the Court set forth the applicable tests for preemption, conflict, and substantial burden on interstate commerce. None of these tests were met, and appellants failed in their appeal.

The Court stated that intent to preempt–

> is not to be implied unless the act of Congress fairly interpreted, is in actual conflict with the law of the State. *Huron, supra*, at p. 443, 816.

In considering burden on interstate commerce, the Court stated that the Constitution–

> never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens; though the legislation might indirectly affect the commerce of the country. *Huron, supra*, at p. 443, 816.

But, the Court added, that–

> A state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Huron, supra*, at p. 444, 816.

In discussing the Federal legislation, the Court concluded that it was aimed primarily at and limited to affording protection "from the perils of maritime navigation." *Huron, supra*, at p. 444, 817.

Comparing the Court's decision to our situation at this point, NBAA respectfully points out that there is an actual conflict between Federal enactments and the

Burbank Ordinance. Further, there is an expressed intention on the part of Congress to regulate all of navigable airspace insofar as safety is involved, and this obligation extends beyond safety in flight to safety of persons and property on the ground. Furthermore, the Burbank Ordinance invades an area so charged with a need for uniformity of regulation that few who have travelled in an aircraft will argue with the concept.

It was argued that in *Huron* that the mere licensing of the vessels by Federal authority would manifestly constitute a preemption. The Court struck down this argument. The Court went on to add that Detroit, in enforcing the Code involved, did "not exclude any vessel from the Port of Detroit, nor did it destroy the right of free passage." *Huron, supra*, at p. 448, 818.

In the case before this Court, the Federal government does more than license aircraft and crew. It regulates every movement of an aircraft from the time its engines are started for take-off, until it has completed its roll-out and has reached its parking spot. It regulates each aspect of air carrier economics. It plays a role in airport placement and use, and selection and installation of air navigational facilities.[12] There are no parallels between the extent of Federal involvement with aviation and the two boats owned by appellant in *Huron, supra*.

Indeed, the Court in *Huron* gives us some valuable clues in handling the Burbank situation. It tells us that, after all, no vessel was denied entry to Detroit's ports. Yet Burbank would deny those entitled to utilize airspace at the Hollywood-Burbank airport. The Court tells us that Detroit denied no one the right of free passage. Burbank would deny aviation users that right, guaranteed them by the Federal Aviation Act, at the Hollywood-Burbank airport.

[12] 49 USC 1349, 1350, 1348(b), 1353.

3) Test (4)–If it should be found that the announced preemption discussed in Test (1) is not sufficient, or that an actual conflict between the Federal enactments and Burbank Ordinance does not exist, then this Court should affirm the Courts below, for clearly there is an implied Federal preemption of navigable airspace as it is affected by aircraft noise and safety.

This last test suggested by Chief Justice Matthas surely must be found to apply to the case before the Court. In discussing it, we will break it up into its various elements.

a. The Aim and Intention on the Part of Congress With Respect to Aircraft Noise, was to Occupy the Entire Field.

We have already discussed the Federal Aviation Act of 1958 with respect to Congressional intention in the safety areas, and we have indicated a direct relationship between noise and safety resulting in a direct preemption. It is also apparent, in reading the Noise Act of 1968 which added Section 611 to the Federal Aviation Act of 1958 (49 USC 1431), as well as the recently passed Noise Act of 1972[1] amending Section 611, that a cogent argument can be addressed to the intention on the part of Congress to occupy the area of regulation of aircraft noise, not only from a safety point of view, but from a noise point of view as well.[2]

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[1]P.L. 92-574, 92nd Cong. 2nd Sess., October 27, 1972 ____ Stat. ____.

[2]NBAA has elected to treat this matter under this test rather than in Test (1) because of some ambiguity in the language in the preemption sections of the 1968 and 1972 enactments. The intention to preempt, however, is there.

1. Discussion of the 1968 Noise Act.

Turning first to Section 611 of the Federal Aviation Act, as originally enacted by Congress as Public Law 90-411 in 1968 (hereinafter referred to as the 1968 Noise Act), we find that the Administrator of FAA was required by Congress, within the framework of the Federal Aviation Act of 1958, to prescribe and amend–

> such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules and regulations in the issuance, amendment, modification, suspension or revocation of any certificate authorized by this title. [§611(a).]
>
> The Administrator is required to consult with such Federal, State and interstate agencies as he deems appropriate. [§611(b)(2).]

In considering this enactment, Hon. Congressman Pickle spoke in support of H. R. 3400. He stated that–

> The Committee, in narrowing the governmental responsibility, requested the noise functions in FAA, which is a part of DOT. Perhaps, more importantly, the Committee made the authority mandatory, rather than discretionary, to assure that the job would be carried out quickly.
>
> *We have to relate noise abatement with safety and this must be realized by all citizens. It is not enough to simply obtain noise abatement. We must have abatement but still maintain safety standards.*[3] [Emphasis supplied.]

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[3] Remarks of Hon. Cong. Pickle, H.4707, Cong. Record, 90th Cong. 2nd Sess., June 10, 1968.

In requiring the FAA to act, and adding this requirement to the 1958 Act, Congress clearly intended to preempt the noise area. Interestingly enough, Congressman Pickle reaffirms NBAA's contention that aircraft noise control and safety are inextricably entwined.

Senator Monroney, writing for the Senate on the House Bill that was enacted, provided some language in the area of Federal-State relationships. From the face of the 1968 Act, it appears that the only duty of the Administrator is to consult with State governments as he deems necessary.

In the Senate Committee report, however, a slight confusion is created.

Senator Monroney stated:

> It is not the intent of this Committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.[4]

It is unfortunate that this language has been seized upon to confuse a clear intent to preempt. Prior to making this statement, the Senator wrote:

> The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. *As indicated earlier in this report*, certain actions by State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. . . .[5] [Emphasis supplied.]

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[4]S. Rep. No. 1353 on H.R. 3400, 90th Cong. 2nd Sess., July 11, 1968, at p. 6.

[5]*Ibid.*, at p. 6.

The italicized reference is to a statement made by Senator Monroney earlier in the report that planning for land use in areas near airports is a matter largely within the province of State and local governments.[6]

Senator Monroney, after he made the statement we consider confusing of the issue, went on to cite and quote the Secretary of DOT's letter to the Committee of June 22, 1968, and stated that the Committee concurred in the views expressed therein.

> The Courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible level of all overflying has recently been struck down because it conflicted with Federal regulation of air traffic.
>
> *H. R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police power to control noise by regulating the flight of aircraft.* [Emphasis supplied.][7]

Senator Monroney, after adopting this language, added that:

> Of course, the authority of units of local government to control the effects of airport noise through the exercise of land use planning and zoning power is not diminished by the bill.[8]

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[6] *Ibid.*, at p. 2.

[7] The Secretary is referring to the *Hempstead Case, supra.*

[8] *Ibid.*, at p. 7.

From the foregoing, the following analysis is made. The 1968 Act was an amendment to the Federal Aviation Act of 1958. Absent an intention expressed by Congress to treat it differently, the 1968 Act must be considered within the framework of the 1958 Act. It is clear from the cited statement by Congressman Pickle that Congress intended to apply all that went into the 1958 Act to the 1968 statute.

The next point to be made is that, from NBAA's study of the 1958 Act, *supra*; it is clear that all aspects of flight through navigable airspace are preempted by Congress. The graphic exchange between Mr. MacIntyre and Senator Monroney reported *supra* amply demonstrates that all aspects of flight in and around airports are included.

Even without support from the 1958 Act, it is clear from the Report on the 1968 Act that there was no intention to leave authority over aircraft flight in the area of noise regulation to the States or local governmental units. Though it is stated that there is no intention on the part of Congress to change the apportionment of power between the State and Federal Government, in order to understand what this means, we must unravel exactly what that apportionment is.

The report tells us what it is. The State and local governments have authority in the area of land use planning and in zoning, and that is all. The 1958 Act was clear on the subject, and no change was intended by the 1968 Act. What can be clearer than the statement by the Secretary of Transportation, adopted in full by the reporting committee, to the effect that "state and local governments will remain unable to use their police power to control noise by regulating the *flight* of aircraft?" [Emphasis supplied.]

Curfew which prohibits the take-off of aircraft is undoubtedly a regulation of the flight of aircraft. We urge the Court to recall Section 101 (32) of the 1958 Act, defining flight on aircraft;

> An aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

Virtually every operation of an aircraft is considered to be "flight." Further, the Act intends to regulate not only flight, but aircraft operations as well. Operation of aircraft is defined by 49 USC 101(26):

> 'Operation of aircraft' or 'operate aircraft' means the use of aircraft for the purpose of air navigation and includes the navigation of aircraft.[9]

Operation, then includes flight of aircraft. The Administrator clearly has exclusive jurisdiction over all aircraft operations on the ground and in flight at the Hollywood-Burbank airport, and a clear intention to preempt can be construed as a part of the 1968 Act.

2. Consideration of the 1972 Act.

The Noise Control Act of 1972[10] contains, among other things, an amendment to Section 611 of the Federal Aviation Act. The change was one of great moment to the FAA, for it gave FAA a partner in

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[9]FAA has added a Section 91.10 to its regulations, 14 CFR 91.10, to include within the definition of operation of aircraft the act of taxiing or maneuvering at gates. The new definition was proposed in NPRM 66-36, 31 F.R. 13352, October 14, 1966, and was adopted as amendments 1-13 and 91-43 in 32 F.R. 9640, July 4, 1967, after notice and comment.

[10]P.L. 92-574, 92nd Cong. 2nd Sess., October 27, 1972, ___ Stat. ____.

regulating aircraft noise–the Environmental Protection Agency.[11] There was no intention to weaken the Federal preemption or allow a greater role on the part of State or local governments with respect to regulation of aircraft noise.

a. The Preemption Section of the 1972 Act.

The preemption section of the 1972 Act is located in Section 6(e), but it does not apply to aircraft noise. Section 6 is discussed in the House Report, and it is expressly stated, in parentheses, that

> The preemption provision discussed in this paragraph does not apply to aircraft. See discussion of aircraft noise below. [H. Rep., at p. 8.]

If this preemption in Section 6 applied to aircraft, Appellants would have some basis for arguing that locally imposed curfew would be permitted, for the report specifically states that with respect to non-aircraft noise:

> Localities are not preempted from the use of their well-established powers to engage in curfews. . . . [H. Rep., at p. 9.]

The previous language to this citation removes it, however, from consideration.

In amending Section 611 of the 1958 Act, the Committee report states that–

> No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local

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[11] H. Rep. No. 92-842, accompanying H.R. 11021, 92nd Cong. 2nd Sess., Feb. 19, 1972. The addition of EPA was necessitated to protect the public interest, and to hurry along FAA activity in implementing noise control measures. At p. 8.

governments that existed with respect to matters covered by Section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill. (At p. 10.)

Congress, therefore, did not intend to disturb the preemption with respect to aircraft noise established by the 1968 Act, discussed previously. NBAA would have the Court accept this statement and analysis, and find a Congressional intention in the 1968 and 1972 Acts to preempt the field of aircraft noise regulation.

b. Other Aspects of the Legislative History of the 1972 Act.

The 1972 Act was the subject of much debate. Bills covering the matter were introduced in both houses.[12] The bill finally adopted was the House version,[13] being marginally different from the Senate version.[14]

The House bill was reported out of committee on February 19, 1972, and was passed by the House after a short debate on February 29, 1972.[15] The Senate bill was reported out of Committee on September 19, 1972, and was passed by the Senate on October 13, 1972, but the House bill was adopted on October 18, 1972.[16]

It is interesting to note that the House considered the subject of Federally imposed curfew, and rejected it.

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[12] Some 11 bills concerning environmental noise were introduced in the House between March 1, 1972, and July 31, 1972.

[13] H.R. 11021.

[14] S. 3342.

[15] Cong. Rec., 92 Cong. 2nd Sess., H. 1508, Feb. 29, 1972.

[16] Cong., Rec., 92 Cong. 2nd Sess., S. 18014, Oct. 13, 1972. Cong. Rec., 92 Cong. 2nd Sess., S. 18646, Oct. 18, 1972.

Three bills entertaining curfew as a viable answer to the aircraft noise problem were introduced, H. R. 13919, H. R. 16110, and H. R. 15500, but were never reported out of the Committee. On February 29, 1972, the date of the passage of the House Bill, an amendment to it was considered by the House. Congressman Mikva, the author of one of these bills, suggested the amendment which would set up a curfew commission in the area of aircraft noise pollution. The House considered the amendment, and rejected it.[17]

The Senate, too, had its rendezvous with curfew. On October 12, 1972, Senator Muskie, a sponsor and co-author of S. 3342, recommended an amendment requiring the Environmental Protection Agency to publish regulations on the issue of aircraft noise. This amendment was rejected.[18]

Senator Muskie then proposed a second amendment which would permit states and localities to adopt "more stringent controls" in the noise area and the "ability to enforce them."[19] This amendment was designed to allow the States and local governments to regulate aircraft noise through curfew. Senator Muskie stated that he would not–

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[17] Cong. Rec., 92nd Cong. 2nd Sess., H. 1534-1536, Feb. 29, 1972.

[18] Cong. Rec., 92nd Cong. 2nd Sess., S. 17753-17754 and S. 17776, Oct. 12, 1972. It cannot be said that Congress did not entertain the immediate implementation of noise standards by EPA. Therefore, the argument that Congress has not regulated in the field and has not considered regulating cannot stand.

[19] *Ibid.*, at S. 17782.

> support Federal preemption which protects product manufacturers and the air transportation industry. . . .[20]

The amendment was rejected.[21]

Senator Muskie expressed his views on the final version of S. 3342 and H. R. 11021 in a minority statement accompanying the Senate Report on the 1972 Act. In this statement, Senator Muskie makes it clear that he considers the field of aircraft noise to be preempted by Congress.[22] He also states that the final version of the Act would prohibit the localities from enacting regulations intending a "modification in hours of airport use."[23] Thus permission for locally imposed curfew was considered by Congress, and rejected.

The legislative history of the 1972 Act is replete with statements that lead to the conclusion that Congress has specifically preempted the area of aircraft noise, and therefore has lodged responsibility in FAA and EPA.

b. The regulatory scheme with respect to safety and noise control is so pervasive that, in itself, it represents an intention on the part of Congress to preempt the field.

The Court has recognized that air transportation is regulated by a comprehensive scheme, and such regulation is necessitated by the nature of the air transportation industry. See *Chicago and Southern*

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[20] *Ibid.*, at S. 17784.

[21] *Ibid.*, at S. 17785.

[22] Minority Report on S. 3342, Report No. 92-1160, 92nd Cong. 2nd Sess., Sept. 19, 1972, at pp. 22 and 23.

[23] *Ibid.*, at p. 25.

Airlines v. Waterman S.S. Co., 33 U.S. 103, 68 S.Ct. 431 (1948).

We had discussed the pervasive Federal regulations in the area of conflict with respect to safety and with respect to economic controls. In that section brief mention was made of conflict between noise regulation by FAA and locally imposed measures. We will expand upon that subject in this heading. We will not discuss regulations issued under the 1972 Act for tnere are none as yet. We recall, though, that an amendment to the 1972 Act requiring EPA to issue regulations was entertained by the Senate and rejected.

We have cited two cases that hold if, in a preempted area, a State or local government is doing more than the Federal government in the way of regulating, the local enactment must still fall. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8 Cir. 1971); *Charlestown and W.C.R.R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915).

Justice Holmes, Writing for the Court, stated:

> When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.[1] *Varnville, supra*, at pp. 604, 717.

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[1] Also see *Napier v. Atlantic Coast Line*, 272, U.S. 605, 47 S. Ct. 207 (1926).

3. *FAA has enacted regulations in the area of noise control.*

In accordance with the mandate provided by the 1968 Act, FAA enacted a new Part to its Regulations, Part 36 (14 CFR Part 36). It was adopted on November 3, 1969, but published in 34 F.R. 18355, Nov. 18, 1969, effective December 1, 1969. Its purpose was to provide noise standards for type certification of subsonic transport aircraft and subsonic turbojet aircraft of any category.

In addition to Part 36, FAA has undertaken the imposition of preferential runway systems, and noise abatement programs tailored to the needs of the individual airports.[2] There cannot be an adoption of a uniform noise abatement procedures for take-offs and landings across the United States because of the special geographical properties of each locality that would impede such a program.[3] However, in the interest of safety of flight, the procedure adopted, though varied from airport to airport, must be imposed by a centralized authority.

Mr. John H. Shaffer, Administrator of FAA, summed up this position in his testimony to the Aviation Subcommittee in 1971.

> I remind all of us that the first mission of FAA is the safety of flight. We can reduce noise by redesign of the machine, the airframe, with the power plant, combination in the aircraft. We can work with the communities to consider the "receiver" of the

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[2]Hearings, Subcommittee on Aviation, Senate Commerce Committee, on S. 1016, 92nd Cong. 1st Sess. Part 2, July 12 and 13, 1971, at p. 672. Also see testimony of Roman Lemmer, Appellees App., p. 316 *et seq.*

[3]*Op. Cit.*, Sen. Hearings, at p. 683.

sound—the people who live nearby. But the changes we make must not compromise the safety, health and welfare of those who fly—the pilots—flight crews, and passengers. Each change, each step, must be tested. *We must ask each time—is this the safe as well as the right thing to do?*[4] [Emphasis supplied.]

The FAA's regulations may not be as extensive as expected or desired by the City of Burbank, but all the consequences of the curfew must be considered. *Udall v. FPC*, 387 U.S. 428, 87 S.Ct. 1712 (1967). It is suggested that if the remedies promulgated by FAA to date are not stringent enough, application be made to FAA for relief. See *Texas and Pacific R. Co. v. Abilene*, 204 U.S. 426, 27 S.Ct. 350 (1906).

4. *FAA has enacted a comprehensive set of safety rules that pervade the area.*

We need only refer briefly to the fact that FAA has totally regulated operational safety in airspace. FAA type certificates aircraft, aircraft appliances, aircraft products, and aircraft parts (14 CFR Part 21 *et seq.*). FAA provides for complete airworthiness standards for all types of aircraft (14 CFR Parts 23, 25, 27, and 29). It even provides airworthiness standards for manned free ballons (14 CFR Part 31).

Airworthiness standards are prescribed for aircraft engines (14 CFR Part 33); propellers (14 CFR Part 35); and materials parts, appliances and products (14 CFR Part 37. Part 37 sets forth technical standards for production of these items).

FAA has a system for inspection and direction of repairs on all aircraft, engines, propellers, appliances, or

[4] *Ibid.*, at p. 675.

aircraft products (14 CFR Part 39). It prescribes the methodology for maintenance, preventative maintenance, rebuilding or alteration (14 CFR Part 43), and regulates identification and registration markings on all aircraft, engines, propellers, applicances or aircraft products (14 CFR Part 45). Registration of aircraft is covered by 14 CFR Part 47. Recordation of aircraft conveyance and security documents is regulated in 14 CFR Part 49.

Part 61 of the Regulations, 14 CFR Part 61, is devoted to a comprehensive scheme of certification of pilots and flight instruction. Part 63, 14 CFR Part 63, is concerned with flight crew members other than pilots, while 14 CFR Part 65 is involved with airmen other than flight crewmembers. Part 67, 14 CFR 67, sets forth a vast system of medical standards.

FAA regulates the use of airspace in Parts 71 through 77, 14 CFR Parts 71-77, and includes therein designation of airways, low area routes, controlled airspace and reporting points. Jet routes are established, as well as high area routes. Part 77 regulates objects affecting navigable airspace, including obstacles in the area of airports.

Air traffic and general operating rules are found in Parts 91 through 105, 14 CFR Parts 91-105. These parts contain general operating and flight rules, special air traffic rules and airport pattern rules, regulations concerning instrument flying altitudes, standard approach procedures, security control of air traffic, rules pertinent to moored ballons, kites, unmanned rockets and unmanned full ballons, transportation of hazardous materials, and parachute jumping.

Air carriers and those operating in air transportation are controlled by 14 CFR Parts 121-137. Pilot schools are regulated by 14 CFR 141; ground instructors by 14 CFR

Part 143; repair stations by 14 CFR Part 145; aviation maintenance technician schools by 14 CFR Part 147; and parachute lofts by 14 CFR Part 149.

Federal aid to airports and standards thereof are governed by 14 CFR Part 151. Acquisition of U.S. land for public airports is covered by 14 CFR Part 153. Other airport rules are found in 14 CFR Parts 155-159.

By Public Law 91-258, Congress added a new part to the Federal Aviation Act of 1958, Section 612, 84 Stat. 234. That Section provides for the issuance of airport operating certificates to those airports serving air carriers certificated by the CAB, and for the establishment of minimum safety standards for the operation of certificated airports. These standards have not yet been set.

In reporting the bill, H.R. 14465, the House Report considered airport certification and stated:

> The airport is an instrumentality of interstate and foreign commerce. It is used by the public and the manner in which it is maintained and *operated* is vital to the public safety. It is in the public interest that the airport be certificated by the Federal Government as to its *adequacy for the safe conduct of flight operations in the national air transportation system.*[5] [Emphasis supplied.]

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[5]H. Rep. 91-601, accompanying H.R. 14465, 91st Cong. 2nd Sess., October 27, 1969, 2 U.S. Code Cong. & Admin. News, p. 3058, 1970.

5. The CAB has enacted extensive rules regulating commercial air carriers.

The Civil Aeronautics Board's Rules are extensive and detailed. With respect to air carrier use of an airport, 14 CFR 202.3 requires an air carrier to apply to the Board for authority to use any airport. Section 202.6 (14 CFR 202.6) provides rules with respect to scheduled stops, and any change in service pattern must be authorized through application (14 CFR 202.4). Similar rules apply to Foreign Air Carriers (14 CFR Part 203). Inauguration or suspension of service is required in 14 CFR Part 205. Traffic and routings are regulated by 14 CFR Part 221.

The aviation industry is completely and thoroughly regulated from airport-to-airport. The scheme is so pervasive that an intention to fully occupy the field must indeed be presupposed.

c. The Subject of Aircraft Noise Is Heavily Involved with Aircraft Safety, and Therefore Demands an Exclusivity of Federal Regulation in Order to Achieve Uniformity Vital to the National Interest.

It has been stated that even where there is no Federal legislation, in cases where the National interest requires uniformity, Congress occupies the field under the Commerce Clause of the Constitution, *Kelly v. Washington*, 302 U.S. 1, 58 S.Ct. 87 (1937). We have here Congressional enactments, and the regulations of two agencies vitally important to the air transportation industry. The need for uniformity in noise-safety regulation has been expressed many times over in this document and by commentators upon the several statutes involved.

The question in applying the uniformity test is–

Whether the State interest is outweighed by a National interest in the unhampered operation of interstate commerce. *California v. Zook*, 336 U.S. 725, 69 S.Ct. 841 (1949), at p. 728, 843.

The danger of unharmonious systems that will be destructive of a Federal scheme are spelled out in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945), as well as *Udall v. FPC, supra.*

In *Southern Pacific, supra*, National uniformity was required in the length of trains passing from State to State. Arizona wanted to, and did by statute, limit the length of trains passing through that State in the interest of safety. The Court, in examining that statute passed as a police power measure, considered the cost of complying, delays in deleting and then adding cars, needs for additional manpower, equipment, inconvenience to travellers, and delays in mail and freight, and concluded that the statute would disrupt a requisite National uniformity.

We have much the same circumstances here. We have considered *Southern Pacific* above from the point of conflict, but it is as applicable from the point of view of required uniformity. Just as a local statute requiring trains to be shorter than they normally are would cause delays, so would the Burbank type of ordinance. The Burbank type of ordinance would disrupt cargo shipment, the mails, and would cause inconvenience. If curfew were permitted by anyone other than a centralized authority, safety would be disrupted. More equipment would be required. Pilots who can fly only so many hours without rest[6] would not be able to take out a diverted flight the next day after meeting with curfew.

[6] 14 CFR §121.471 *et seq.*

This would necessitate an expansion in staff on the part of air carriers. Maintenance schedules would be disrupted, and traffic would be severely hampered and disrupted. The same reasons for striking down the Arizona statute exist with respect to the Burbank Ordinance.

When Congress decides uniformity is necessary, State laws must not be allowed to interfere, *Hines v. Davidowitz, supra*. It appears to NBAA, based upon its evaluation of the Federal Aviation Act of 1958, the 1968 amendment adding Section 611, and the 1972 Act amending Section 611, that the Federal Government indeed has required uniformity.

d. The Burbank Ordinance Stands as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of Congress.

The analysis submitted to this point clearly demonstrates that the Federal Government has expressly preempted the field of aircraft safety regulation. It has been established that the Burbank Ordinance, and those that will follow it, are disruptive of a fragile though comprehensive scheme of air traffic regulations that requires unformity and harmony in its maintenance. The noise legislation discussed and its history show at least an implied intention to preempt. Summing it up, this Court must conclude that the Burbank Ordinance stands as an obstacle to the full implementation of a carefully conceived Federal program.

POINT II

THE ORDINANCE OF THE CITY OF BURBANK AND SIMILAR CURFEWS CURTAILING OPERATIONS AT AIRPORTS CONSTITUTE A REGULATION OF INTERSTATE COMMERCE THAT IS NEITHER INDIRECT NOR OF INCIDENTAL BURDEN THEREUPON.

The regulation of airspace is clearly based upon Congressional authority to regulate interstate commerce under the Commerce Clause, U.S. Constitution, Art. I, Section 8, Clause 3. All aviation utilizing navigable airspace is therefore in interstate commerce.[1] NBAA, however, will direct its attention not to the Sunday or pleasure fliers, but to the Nation's air carriers and its own membership.

A. The Air Transport Industry.

In 1970, it was found by Congress that–

The air transport industry provides a significant contribution to the Nation's economy. Operating revenues of the scheduled carriers in 1968 amounted to over $7.75 billion. This was more than double to $3.76 billion generated on 5 years earlier. Total assets of the industry increased from $4.1 to $11 billion during the same period.

In terms of employment, the scheduled airline industry directly provided over 300,000 jobs at the end of 1968, a two-thirds increase over the employment level of 1963.

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[1]Hearings on S.3880, Subcommittee on Aviation, Senate Interstate and Foreign Commerce Committee 85th Cong. 2nd Sess., May and June 1958, p. 333.

> The vital and growing role of air carriers in the Nation's Commerce is apparent from the 72.5 per cent of intercity common carrier passenger miles in 1968 which were travelled by air. This compares with only 39.3 percent some 10 years earlier. The predominance of air [travel] [sic] in overseas travel has grown to the point wherein 1968 more than nine out of every 10 overseas travellers chose air.[2]

ATA Vice President Clifton Von Kann testified at the trial below.[3] He indicated that in 1969, the Nation's air carriers transported 150,000,000 passengers utilizing 2400 aircraft, about 1900 of which were jets. He further indicated that 4.7 billion cargo-ton miles were flown.[4] Movement of passengers involves interstate commerce, in and of itself, *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164 (1941).

B. Business Aviation.

In NBAA's statement on the "interest of the Amicus", some facts were presented concerning the role of business aviation in air transportation. Those remarks are incorporated herein without repeating them. We would just add that business aviation is not only in interstate commerce because business aircraft utilize the airways. Business aviation is in interstate commerce because the aircraft of businesses are transporting officers and employees of these corporations which are heavily engaged in interstate commerce.

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[2] H. Rep. No. 91-601, 91st Cong. 2nd Sess., Oct. 27, 1969, 2 U.S. Code Cong. and Ad. News 3047 (1970), at 3052.

[3] Appelles App., 246 *et seq.*

[4] *Ibid.*, at pp. 248, 249, 250.

When the Federal Aviation Act of 1958 was originally considered, NBAA participated.[5] Mr. W.K. Lawton testified that at that time there were about 26,000 business aircraft, 2,500 of which were multi-engined aircraft. Business aviation users were ahead of the airlines in operating jet aircraft.[6] The growth of business aviation has been tremendous, and has been recognized by FAA.

C. Pacific-Southwest Airlines Is Operating In Interstate Commerce.

Appellants have taken the position and made much ado about the fact that only corporate jet operations and one intrastate flight of PSA are affected by the Burbank Ordinance. We have pointed out that the corporate operations are involved in interstate commerce. It is further submitted that PSA is in interstate commerce.

The CAB does not regulate PSA because its operations do not extend beyond the State of California. This means that PSA is not regulated by CAB. It does not mean that PSA is not in interstate commerce. PSA's employees fall under the Railway Labor Act. The airline utilizes airways regulated by FAA. The airline is operated under Part 121 of the Federal Aviation Regulations. Its pilot employees are certified by FAA. Its aircraft will be regulated by Part 36, 14 CFR Parts 121, 61, 67 and 36. The mere fact that PSA operates intrastate is not dispositive of whether or not it is interstate commerce. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 62 S.Ct. 491 (1942).

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[5]See statement of W. K. Lawton, Executive Director, NBAA, Hearings on S. 3880, Aviation Subcommittee, 85th Cong. 2nd Sess., May and June, 1958, at p. 301 *et seq.*

[6]*Ibid.*, at pp. 302, 308 and 316.

D. Operations at the Hollywood-Burbank Airport.

The Hollywood-Burbank airport handled 1,178,000 passengers in 1969.[7] PSA airport operates flights into and out of the airport, as well as Air West, Continental, United, and Western Airlines. These airlines are certificated by the CAB. Air West and Continental utilize the airport directly, as does PSA, while United and Western are designated to utilize the airport as an alternate to Los Angeles International Airport.[8] It was estimated the Hollywood Burbank airport was used as an alternate for 140 flights, or about 470 hours of such use.[9]

Continental Airlines is certified by the Civil Aeronautics Board to operate into and out of the airport, utilizing Boeing 727-200 aircraft. Many of the flights conducted are interstate in nature,[10] between Burbank and Portland, and Seattle.[11] No testimony was presented by Air West, United or Western.

The corporate jet operations at the airport were estimated at 275 each month, with 60 or so taking place at night.[12]

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[7] Appellees App., p. 142.

[8] *Ibid.*, pp. 148-150.

[9] *Ibid.*, pp. 150-151.

[10] *Ibid.*, pp. 205-206.

[11] *Ibid.*, p. 207.

[12] *Ibid.*, p. 149.

E. Effect of Burbank Curfew.

It was stated at the trial below that the Burbank curfew would immediately affect one flight of PSA which departed Hollywood-Burbank Airport for San Diego at 11:30 P.M. This flight averages 125 passengers out of Burbank, 80-85 originating there. Most of these passengers are military personnel.[13] The curfew would require the incoming aircraft to land not at Hollywood-Burbank, but at Los Angeles. Passengers incoming to Burbank would have to be bussed to Burbank. Those going to San Diego from Burbank would have to be bussed to Los Angeles.[14] PSA would suffer in the area of maintenance as well, as the aircraft would be needed at San Diego for maintenance. The delay caused by PSA going to Los Angeles because of the Burbank situation would be destructive of this end. The total loss to PSA in complying with the curfew would be in the area of $6,500 a trip.[15] PSA would have to change 9 or 10 departure times to comply with the Burbank Ordinance.[16]

Continental would be restricted from operating an intended Southbound flight from Seattle at 8:00 P.M. Los Angeles Airport could not be used, as Continental's CAB authorization does not authorize a Seattle-Los Angeles route.[17] None of Continental's present flights would be affected.

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[13] *Ibid.*, pp. 75-75.

[14] *Ibid.*, p. 77.

[15] *Ibid.*, pp. 77-81.

[16] *Ibid.*, p. 96.

[17] *Ibid.*, Tr. 213.

F. Effect of Implementation of Similar Curfews at Other Airports, Nationwide.

Mr. James L. Mitchell, testifying on behalf of Continental, estimated that a curfew similar to the Burbank curfew in Portland alone would cause the cancellation of its Northbound flights to Portland or Seattle out of Burbank or Ontario, California, after 7:00 P.M.[18] A nationwide curfew between 11:00 P.M. and 7:00 A.M. would cause the cancellation of 48 of Continental's departures.[19] It would be disruptive of maintenance and result in considerable economic penalty.[20] Mail and freight is mostly carried at night, departures occurring between 10:00 and 11:00 P.M.[21] It was estimated that such a curfew would prevent Continental from adequately serving its passengers, carrying mail in accordance with its postal contracts, and would be disruptive of its cargo service. Continental would have to cancel 15% of its aircraft miles flown or 30,000 miles a day, or 28 flights a day cancelled. 14.9% of the cargo flights wouls be lost.[22] Net operating cost would increase 25% due to loss of night flying capacity, need for six new aircraft at a cost of 5-7 million dollars each and loss of revenues.[23]

Clifton Von Kann, of ATA, estimated that the rate of return on equity investment for the airlines in 1969-1970 was less than 1%, and that nationwide curfew would be

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[18] *Ibid.*, p. 215.

[19] *Ibid.*, p. 217.

[20] *Ibid.*, pp. 219-220, 230.

[21] *Ibid.*, p. 218.

[22] *Ibid.*, pp. 231-235.

[23] *Ibid.*, p. 235.

considered financially catastrophic by the airline industry.[24] Congestion alone, without curfew, would cost the airlines about $1,500,000 in 1970.[25] National curfew ordinance would result in the cancellation of an estimated 1009 flights, and would have a major effect on the carriage of cargo and mail, as half the mail would be delayed.[26] Scheduling changes from the cancellations would involve massive disruption.[27]

James T. Pyle, a former Administrator of CAA, and Deputy Administrator of FAA, testified that in 1966, his group known as the Aviation Development Council at LaGuardia Airport considered curfew from 12:00 Mid-night to 7:00 A.M. in 1966. This sort of curfew was abandoned, for it would constitute an "untenable burden on air commerce."[28] It was estimated, as a result of Mr. Pyles' 1966 study on curfew, that 1107 weekly services would be cancelled, and 1370 odd operations would be discontinued, for a total elimination of 2474 operations each week.[29] Of these operations 607 were all-cargo.

G. The District Court's Findings.

The Court below found that curfew ordinances similar to the Burbank Ordinance "would promptly be adopted by virtually all cities surrounding airports." It was upon this assumption that the Court concluded that the curfew

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[24] *Ibid.*, pp. 251-252.

[25] *Ibid.*, p. 253.

[26] *Ibid.*, p. 266.

[27] *Ibid* , pp. 259-266.

[28] *Ibid.*, pp.283-284.

[29] *Ibid.*, p. 286.

in question as an unconstitutional burden on interstate commerce. The 9th Circuit did not reach this question.

The Court below has been criticized for speculating upon the adoption of curfew by other cities. The assumption, though, is reasonable. Curfew has been enacted by a judge in New Jersey,[1] a court in Arizona,[2] and recently, by another New Jersey Court.[3] A lawsuit asking for a curfew at White Plains, Westchester County Airport has been threatened by the Town of Greenwich, Connecticut.[4]

The natural consequences of supporting the Burbank Ordinance is an appropriate consideration for the Court. *Udall v. FPC, supra; Northern States Power Co. v. Minesota, supra.*

In *Northern States, supra,* Chief Justice Matthas opined that–

> Were the States allowed to impose stricter standards on the level of radioactive waste released they might conceivably be so over-protective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power.

Just as Justice Matthas engaged in carrying the matter before him to its logical conclusion, so did the Court below. The Court's foresight should be the subject of commendation, not criticism.

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[1] *Township of Hanover v. Town of Morristown*, 108 New Jersey Super. 461, 261 A.2d 692 (1969).

[2] *Williams v. Superior Court of Arizona*, ____P.2d ____(1972).

[3] *Parachutes, Inc. v. Lakewood*, ___N.J. Super. ___, ___A.2d ___, (1972), 12 Avi. Law Reports 17,623.

[4] News Week, June 15, 1972, at p. 82.

H. The Case Law Tests.

A State law may not be struck down merely because it affects interstate commerce in some way. *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 83 S.Ct. 1759 (1963); *Huron Portland Cement v. Detroit, supra.* But "no State may completely exclude Federally licensed commerce. . . ." *Florida Lime and Avocado Growers, supra*, at p. 142, 1217; *Huron, supra.* States may regulate those subjects which, because of their number or diversity, may never be adequately dealt with by Congress, but–

> . . . [E]ver since *Gibbons v. Ogden* [citation omitted], the States have not been deemed to have authority to impede *substantially* the free flow of commerce from State to State, or to regulate those phases of national commerce which, because of the need of national uniformity demand that their regulation, if any, be prescribed by a single authority. *Southern Pacific Co. v. Arizona, supra*, at p. 767, 1519.

State statutes which bring to bear a burden on interstate commerce have been held to violate the Commerce Clause. *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729 (1913); *Mississippi R. Commission v. Illinois Central R. Co.*, 203 U.S. 335, 27 S.Ct. 90 (1906).[5]

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[5]In the *Illinois Central* case, *supra*, a State regulation requiring interstate passenger trains to stop at a specific town, at a specific time, although otherwise served, was held to be violative of the Commerce Clause. If the Commission could order stoppage at this town, the Court opined that it could order other stoppages, and this would be disruptive of interstate commerce. Also see *Seaboard Air Line R. Co. v. Blackwell*, 244 U.S. 310, 37 S.Ct. 640 (1917), where a State statute ordering trains to slacken speed within 400 yards of each railway crossing in the State of Georgia was held to be a burden on interstate commerce.

A State may provide for the health, safety and morals of local concern, although interstate commerce may be incidentally or indirectly involved. *Minnesota Rate Cases, supra; Louisville and Nashville R. Co. v. Kentucky,* 183 U.S. 503, 22 S.Ct. 95 (1901); *Savage v. Jones,* 225 U.S. 501, 32 S.Ct. 715 (1912); *Lakeshore and M.S.R. Co. v. Ohio,* 173 U.S. 285, 19 S.Ct. 465 (1899).[6]

The test developed by this recitation is that the States may impinge, under their police power, upon interstate commerce, if the enactment does not disturb a required national uniformity, disrupt free passage in navigable waterways, exclude federally licensed activity, substantially impede or directly burden the free flow of interstate commerce, directly conflict with an act of Congress, or invade a Federally preempted area.

NBAA has demonstrated that the Burbank Ordinance is acting in a preempted area, in direct conflict with Federal enactments.

It has also been shown that the area of aircraft safety and aircraft noise control require uniform action at the Federal level.

These factors aside, it is also true that the Ordinance directly and substantially burdens interstate commerce. The Burbank curfew, applied in Burbank alone, materially effects the operation of corporate operators at

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[6] An Ohio statute required at least three passenger trains belonging to one company, passing through the State, to stop at each city or town of 3,000 people or more. The Court held that there was no violation of the Commerce Clause, as *no trains were required to turn aside from its direct route*. The Burbank Ordinance would cause a considerable amount of "turning aside" of through flights if the case were to turn on the Burbank curfew alone. If applied nationally, 1009 operations would be "turned" from their direct route by way of out-and-out cancellation.

the Airport. PSA, involved heavily in interstate commerce, is interfered with to the extent of $6500 weekly, and is prohibited from instituting any flights after 11:00 P.M. or before 7:00 A.M. Continental Airlines, an interstate carrier, may not institute interstate through flights originating in cities it is licensed to serve so that they will arrive in Burbank after 10:00 P.M. The same is true for Air West. Airlines permitted to utilize the Hollywood-Burbank Airport as a reliever airport may not do so for through flights after 11:00 P.M. or before 7:00 A.M.

Applying the curfew across the nation, carriage of mail will be disrupted, affecting interstate commerce on a grand scale. Cargo operations will be disrupted, massive losses will accrue to the airlines because of as many as 1009 flight cancellations. The safety of the flying public will be endangered. The Ordinance and impending curfew by other localities certainly would not have a merely incidental or indirect impact on interstate commerce. They would be entirely disruptive of it.

In our search, we could uncover only one case dealing with the Commerce Clause that permitted a disruption in interstate commerce by a State statute enacting legislation effectuating noise control. We refer to *Hennington v. Georgia,* 163 U.S. 299, 16 S.Ct. 1086 (1896). Even though the case is quite old, it should be discussed and distinguished. NBAA asks that the case be directly overruled, as its holding applies to interstate commerce.

In *Hennington, supra,* freight trains passing through the State of Georgia were prohibited from operating on Sunday due to a disruption of the Sabbath peace. The dissent in the case pointed out that the Court's holding established the right of the State to interfere with interstate commerce on a weekly basis.

We have traced citations to the *Hennington* case, *supra*, to determine whether it in fact represents the law with respect to the instant case. We have determined that it does not.

The case is last cited in 1961 as a Sunday Blue Law case and has not been cited since. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961), separate opinion, 366 U.S. 420, 81 S.Ct. 1153, and dissenting opinion, 366 U.S. 520, 81 S.Ct. 1218. It is cited in *Huron*, *supra*, for its test of burden on interstate commerce, which is the accepted test developed above. In *Southern Pac. Co. v. Arizona*, *supra*, it is cited in the dissent for some of its language and not its holding. See 325 U.S. 780, at p. 785.

Hennington is cited in *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 55 S.Ct. 497 (1935), at p. 525, 501, for the proposition that a State may protect its residents against unnecessary noise. The case, though, adopts the direct burden on interstate commerce test. *Hennington* was held not to be a direct burden case. That is surely not the case here. In addition, while aircraft noise is unpleasant, it cannot be equated with noise in the area of a hospital, or a jackhammer's noise. Closing a street to traffic near a hospital or shutting down a plant for certain hours does not affect safety. Furthermore, it is clear from *Hennington*, *supra*, that the case is not a noise case, but rather the validation of a State's right to preserve and protect the Sabbath. The Court in *Hennington* further found that there was no Congressional legislation on the subject of regulation of freight trains. Our references to legislation, Congressional intention in both the noise and safety area, and pervasive regulation must surely distinguish the *Baldwin*, *supra*, reference to *Hennington*.

Hennington is considered as a case dealing with incidental burden on commerce in *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251 (1900), at p. 24, 259, and as a Blue Law case in *Petit v. Minnesota*, 177 U.S. 164, 20 S.Ct. 666 (1900).

Erie Railroad v. Purdy, 185 U.S. 148, 22 S.Ct. 605 (1902), considered it an intrastate regulation case. In *Reid v. Colorado*, 187 U.S. 137, 23 S.Ct. 92 (1902), it is cited for the proposition that State regulation conflicting with Federal enactments will cease to have any effect. *Hennington* is a police power case according to *Chicago, B & Q R. Co. v. Illinois*, 200 U.S. 561, 26 S.Ct. 341 (1905). In *Howard v. Illinois* C.R. Co., 207 U.S. 463, 28 S.Ct. 141 (1907), *Hennington* is cited as a supremacy case. It is a police power case that incidentally affected interstate commerce in *New York N.H. R. Co. v. N.Y.*, 165 U.S. 628, 17 S.Ct. 418 (1897), and a supremacy case in *Gladson v. Minnesota*, 166 U.S. 427 (1897).

In *Savage v. Jones, supra, Hennington* is considered to be a case that only incidentally affected interstate commerce, for it did not conflict with Federal legislation, as it was in *Standard Stock Food Company v. Wright*, 225 U.S. 540, 32 S.Ct. 784 (1911). In *Barrett v. N.Y.*, 232 U.S. 14, 34 S.Ct. 203 (1914), it is cited, and it is stated that—

> exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands *and is not opposed to Federal legislation.* At p. 31. [Emphasis supplied.]

Hennington is cited in *Atlantic Coast Line R. Co. v. Georgia*, 234 U.S. 280, 34 S.Ct. 829 (1914), wherein it is indicated that State statutes that conflict with presumed will of Congress "must be required to give way to the supreme authority of the Constitution," at p. 292.

We find *Hennington* again in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), at p. 245, wherein it is declared that State statutes not conflicting with acts of Congress, and only incidentally burdening commerce, may stand. It is distinguished in *Robertson v. California*, 328 U.S. 440, 66 S.Ct. 1160 (1946), and is cited in *Sampson v. Shepard*, 230 U.S. 352, 33 S.Ct. 729 (1912), as a case which stands for the proposition that local regulation, incidentally affecting commerce, and not in conflict with Federal regulation, may stand.

The case may be found in numerous lower court decisions, demonstrating the range developed above.[7] One such decision, *Crown Kosher Super Market of Mass., Inc. v. Gallagher*, 176 F. Supp. 466 (D.C. Mass. 1959), notes that–

> this is a pretty old case, which was decided before the modern development of limitations upon powers of the states implicit in the fourteenth amendment. At p. 477.

From the listing above, it emerges as clear that *Hennington* is an old case, decided not only before

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[7] *Gonzales v. Porto Rico*, 51 F.2d 61 (1 Cir. 1931); *Wrigley Pharmaceutical Co. v. Cameion*, 16 F.2d 290 (DC MD Pa. 1926), *Zayre of Georgia, Inc., v. Marietta*, 416 F.2d 251 (5 Cir. 1969), dissent at p. 255; *Two-Guys From Harrison v. McGinley*, 179 F. Supp. 944 (DC ED Pa. 1959); *Cobb v. Dept. of Public Works*, 60 F.2d 631 (DC Wash. 1932); *Town of Green River v. Fuller Brush Co.*, 65 F.2d 112 (10 Cir. 1933).

modern developments, but at a time when Congress had not yet fully invaded the field of regulating rail transportation. Despite that, the case is wrong-headed. It is inconceivable that today it would be decided the same way. To halt all rail traffic through a state on a given day of the week runs contrary to dozens of later court opinions. If a state cannot slow down trains passing through the state, *Seaboard Air Line R. Co., supra;* require it to stop at designated towns, *Illinois Central, supra*; or regulate the length of trains, *Southern Pac. Co., supra*; how can a State halt all transportation by rail through it for an hour, much less a day. It is submitted that *Hennington,* a case of another day and age, ignored by this court since 1961, be relegated to its consigned place in history, undisturbed by further arousal.

It must be found that the Burbank Ordinance clearly imposes an intolerable burden on interstate commerce for the reasons contained in this point. This conclusion is unescapable.

CONCLUSION

NBAA asks of the Burbank Ordinance: "Is it safe, as well as the right thing to do?"[8] We urge the Court to allow the authorities best suited to answer this question to provide the answer. Congress has empowered FAA and EPA to regulate aircraft noise. We urge that the two

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[8]Hearings, Subcommittee on Aviation, 92nd Congress 1st Sess., Part 2 July 12 and 13, 1972, remarks of John H. Shaffer, Administrator, FAA, at p. 675.

Courts below be affirmed in each and every aspect of their decisions.

Respectfully submitted,

NATIONAL BUSINESS
AIRCRAFT ASSOCIATION

By: Robert D. Powell

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APPENDIX

Exhibit 1

[Filed May 17, 1971]

STRYKER, TAMS & DILL
744 Broad Street
Newark, N.J. 07102
(201) 623-1754
Attorneys for
Applicants for Intervention

TOWNSHIP OF HANOVER, etc., et al., Plaintiffs, v. TOWN OF MORRISTOWN, etc., et al., Defendants, and THE NATIONAL BUSINESS AIRCRAFT ASSOCIATION, INC., etc., et al., Applicants for Intervention.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION-MORRIS COUNTY Docket No. C-3172-68 AFFIDAVIT OF LAWRENCE P. BEDORE

DISTRICT OF COLUMBIA)
CITY OF WASHINGTON) ss:

I, LAWRENCE P. BEDORE, being duly sworn according to law, upon my oath do depose and say:

1. I am employed by The National Business Aircraft Association, Inc. as its Manager of Airport Services. I am authorized to make this affidavit on its behalf.

2. The National Business Aircraft Association, Inc. (hereinafter "NBAA"), which was incorporated under the laws of the State of New York in 1947, has, except for a

registered agent in New York, its only office in Washington, D.C. at 425 13th Street. It exists to protect and promote the business aviation interests of the 840 member companies located throughout the United States and to assure the highest standards of safety and efficiency in the aviation operations of its members. NBAA member companies operate some 2300 aircraft, including more than 600 jet aircraft, for business purposes. (Directory as Exhibit 1).

3. Virtually all non-military, non-commercial jet aircraft in the United States are business aircraft owned by corporations, most of which are members of the NBAA. To the best of my knowledge, the jets that use Morristown Municipal Airport, whether as a fixed base or as transients, are owned by members of the NBAA.

4. NBAA was authorized by its Board of Directors to seek intervention in this action. Our intervention was encouraged by many other national organizations and associations who are concerned with the outcome of the case but are not as vitally interested as the NBAA. (See paragraph 17, below).

5. Business aircraft tie Main Street America to the entire world of commerce. While the scheduled air carriers serve 515 airports in the 48 conterminous states, business aircraft can and do use thousands of the nation's more than 11,000 airports. As business decentralizes, thereby helping to revitalize the rural areas of the nation, the business aircraft become an even more essential mode of national transportation.

6. Business aircraft are tools of management which provide top executives with frequent face to face personal contacts and an increased organizational span of control. These aircraft provide flexible national trans-

portation to busy executives and frequently make five or more business stops in a single day.

7. Business aircraft allow management to go when and where they need to keep pace with the continuing growth and geographical dispersion of successful business operations. The privacy and on-board facilities provided on most business aircraft allow conduct of business and preparation of documents while flying between intermediate points.

8. A user survey made in 1966 by Arthur D. Little, Inc., engineering consultants of Cambridge, Massachusetts, for Lockheed-Georgia, a manufacturer of business aircraft, showed that company aircraft were used mainly for executive and staff travel, because relatively few skilled managers are available to any one company to make top decisions and, in terms of responsibility and geography, their span of control must cover large areas of the organizational structure.

9. NBAA member companies place great importance on safety and reliability in their aircraft operations. All corporate aviation departments have established rules for safety which comply with and in many instances exceed the rigid requirements set by the Federal Aviation Administration (hereinafter "FAA"), the federal regulatory body charged by statute to govern the safe and efficient use of the national airways. Pilots of NBAA members have amassed more than one billion miles of safe flying. This is an enviable record which is annually increasing in mileage and in the degree of increased safety.

10. Pilots and crew members of business aircraft bear a heavy burden of responsibility. Consequently, only well qualified pilots are selected and employed as pilots for

these aircraft. These full-time pilots of NBAA members possess outstanding qualifications and technical competence to safely and efficiently operate the most complex, sophisticated aircraft and their related equipment. A recent survey, taken from membership data cards, of the types of FAA certificates held by 831 NBAA member Chief Pilots showed the following:

Type of FAA Certificate	Pilot Possessing Certificate	% of Total
Airline Transport Pilot	450	54%
Commercial Instrument Pilot	217	26%
Instructor Pilot	126	15%
Commercial Pilot	38	5%
TOTAL	831	100%

The same survey showed the following on 1856 pilots, other than Chief Pilots, for NBAA member companies:

Type of FAA Certificate	Pilot Possessing Certificate	% of Total
Airline Transport Pilot	911	49%
Commercial Instrument Pilot	554	30%
Instructor Pilot	150	8%
Commercial Pilot	241	13%
TOTAL	1856	100%

11. The Airline Transport Pilot Certificate requires the most rigid pilot qualifications as outlined by the Federal Air Regulations of the FAA. Pilots in command of air carrier aircraft are required by the FAA to possess this certificate. The competence and professionalism of

NBAA member pilots is numerically shown by the fact that 54% of the Chief Pilots and 49% of the regular line pilots possess this coveted certificate.

12. The qualifications of the pilots of NBAA members based at Morristown Municipal Airport (hereinafter "MMU") surpass those reported in the all member survey mentioned in paragraph 10. Of the 14 pilots of NBAA members based at MMU, 12 possess the Airline Transport Pilot Certificate and the remaining two possess the Commercial Instrument Pilot Certificate. In addition, these 14 pilots have amassed more than 30,000 jet flying hours, much of which was flown in the high aeronautical density areas of our nation and, in the case of some of these pilots, around the globe.

13. NBAA members place great importance on maintaining the proficiency of their pilots and other crew members. Most of the NBAA members require continuous pilot training programs and much of this training is accomplished by outside professional organizations, such as the renowned Flight Safety, Inc., Marine Air Terminal, La Guardia Airport, New York. All are required to comply with the FAA Regulations.

14. NBAA first became aware of the *Hanover v. Morristown* litigation, to the best of my knowledge, on March 11, 1970, following a telephone conversation initiated by Edward F. Broderick, attorney for defendant, to Robert B. Ward, then Executive Vice President of NBAA. The conversation was reported to me as being one of broad generalities and Mr. Ward responded the next day with a letter, three copies of the NBAA Noise Abatement Program and one copy of AIAA (American Institute Aeronautics & Astronautics) Paper No. 69-1123 (Exhibits 2 and 3, respectively).

15. On March 11, 1970, NBAA sent out to all its members a reissuance of its jet noise abatement procedures in a form to be included in the pilot's "Jeppesen" flight kit. This was also sent to airport manager members of the American Association of Airport Executives and the Airport Operators Council International, two organizations of airport managers. The reissuance was motivated by the desire of NBAA and its members to be "good neighbors" with the communities surrounding airports.

16. In the Spring and Summer of 1970, the NBAA undertook to study the noise abatement problems at Morristown Airport, and I personally made several visits to the Airport. The NBAA developed noise abatement procedures including a "minimum sound track" for Morristown, and after final approval by the FAA, the NBAA had it widely circulated (a copy of the procedures and the minimum sound track is attached hereto as Exhibit 4) in August, 1970.

17. The NBAA also met on many occasions with and studied the problems with other interested groups such as the FAA, the Air Transport Association of America, the Port of New York Authority, the Morristown Airport management, and various national organizations concerned with aviation operations.

18. The NBAA cooperated closely with the FAA in the development of the FAA Tower Bulletin which sets forth the official preferential runway system (attached hereto as Exhibit 5). The NBAA also cooperated with the Morristown Airport in the development of Rules and Regulations for tenants to abate noise (attached hereto as Exhibit 6).

19. During the period January 1, 1969 through March 23, 1970, three NBAA members operating five jet aircraft based at MMU conducted a total of 1406 operations (702 take-offs and 704 landings) at MMU, which was less than 1% of all operations at MMU. This amounts to an average of slightly more than 3 (3.179) landings or take-offs per day. Of the 702 take-offs, 148 occurred before 7 A.M. and 6 occurred after 9 P.M. Of the 704 landings, 16 occurred before 7 A.M. and 96 occurred after 9 P.M. A total of 266 operations (154 take-offs and 112 landings) would have been affected had the operational limitations of the Court Order been in effect during this period. These 266 operations amount to approximately 19 percent (18.918%) of total operations at MMU of these three NBAA members during this nearly 15 month period.

20. Sample surveys of the effects of the operational limitation of the Order have been taken from NBAA members at MMU. For the period March 24, 1970 through August 17, 1970, the logs of three jet aircraft based at MMU show that on 35 different occasions these aircraft were forced to land at another airport instead of MMU, remain overnight and return the aircraft to MMU on the following day because of the operational limitations. In effect, this meant that 70 additional landings and takeoffs were made in the high density New York area while not reducing the number of operations at MMU. On 11 other occasions these three aircraft had to relocate the day before at another New York area airport so that they could perform scheduled departures during the Court limited hours at MMU.

21. A report from another NBAA member operating one jet aircraft which is based at MMU showed the following for a five-month period from March 23, 1970

to August 30, 1970. On four occasions it was necessary to reposition the aircraft at Teterboro on Saturday to accomplish scheduled Sunday departures. On three other occasions it was necessary to depart MMU on Sunday between 1 and 3 P.M. non-restricted operational hours and relocate the aircraft at another New York area airport to meet early flight departures on Monday mornings. And on three other occasions the aircraft arrived in the MMU area after 9 P.M., had to land at Teterboro or Newark, leave the aircraft there overnight, and return the aircraft to MMU the following morning. Again, all of the above resulted in no reduction in operations at MMU, but in additional landings and take-offs in the New York high density area.

22. The imposition of operational limitations by the Court, such as the one presently in effect at MMU, reduces the flexibility and efficiency of business aircraft operations which serve an essential purpose for the economy of the Country. NBAA member aircraft based at MMU fly to many points in the nation as well as to many points on the North and South American continents. The reduction of operating hours at the home base of these jet aircraft, not only imposes inconveniences, increases the expenses of the company owning the aircraft, and negates the many advantages of owning business aircraft, but it also restricts their use in interstate commerce. In addition, the diversion of some NBAA member aircraft from MMU has adversely effected the operations of other NBAA members at neighboring airports.

23. The NBAA and its members depend on the FAA to provide a uniform, safe and efficient management of the national airspace. If the FAA's management of the airspace does not remain exclusive, it will adversely affect

the operations of all users of the airspace and thereby those who depend on air transportation.

24. At least one NBAA member company's aircraft has been based at the Morristown Municipal Airport since 1951. Presently there are five NBAA members based at Morristown and one company which controls another NBAA member company has recently moved its Fanjet Falcon to the Morristown airport. These companies are presently operating eight jet aircraft. Approximately $400,000 has been invested by one of NBAA members in fixed assets on the airport premises and further investment is anticipated depending upon the status of the present jet aircraft operational restrictions.

25. The five NBAA members at Morristown employ a total of 14 pilots and 15 other personnel (Administrative, mechanics, dispatchers, etc.) to staff the five aviation departments. Corporate members with aircraft based at Morristown have plants in Paterson, Passaic, and Madison employing several hundred (approximately 500) employees. In addition, one member company has its corporate headquarters at Morris Plains and approximately 2200 people are employed at this facility.

26. In the New York area (New York, New Jersey and Connecticut) there are 160 NBAA members who operate a total of 436 aircraft. Membership and aircraft, as extrapolated from the 1970 NBAA directory, are distributed as follows:

State	NBAA Member Companies	Jets	Turbo-props	Piston	Total Aircraft
New York	109	98	61	124	283
New Jersey	35	43	31	39	113
Connecticut	16	10	5	25	40
TOTAL	160	151	97	188	436

27. The aviation industry is striving to reduce both noise and air pollution produced by jet aircraft. The ATA has recently issued a booklet outlining its 15 year effort to curb air pollution from aircraft. The concern of the Business Jet division of Pan American World Airways to market an aircraft with a low noise emitting quality is a matter of record. The Fan Jet Falcon is presently the only jet aircraft which meets both the take-offs and approach noise limits for new aircraft of Part 36 of the Federal Air Regulations (Exhibit 7) and 5 of the 8 MMU based jet aircraft are Falcons. The ten point program for effective jet noise abatement outlined by The Jet Center and addressed to all flight crews operating jet aircraft into the Los Angeles area is another example of the aviation industry's concern about airport neighbors on a nationally uniform scale.

28. NBAA has and will continue to work toward an improved and environmentally acceptable solution to the problems of air and noise pollution throughout the nation. NBAA's more recent concern is expressed in its February 19, 1970 letters to the major aircraft engine manufacturers and the American Petroleum Institute. (Exhibits 8 and 9 respectively). The efforts of NBAA and its New York members working with the FAA to increase the maneuvering altitudes for jet aircraft operating into and out of the New York area airports has done much to reduce aircraft noise to all residents of the metropolitan area. NBAA's March 2, 1971 comments to the FAA proposal for the retrofit of jet engines to reduce noise

emissions is the most recent evidence of NBAA concern for the American quality of life. Our efforts will continue—our concern will not abate.

/s/ Lawrence P. Bedore
LAWRENCE P. BEDORE

Sworn to and subscribed before
me, a Notary Public in and
for the District of Columbia,
at the City of Washington,
in said District and City, this
29th day of April, 1971

/s/ Stanley H. Fiscler, Jr.

Notary Public in and for the District
of Columbia in the City of Washington

Exhibit 2

OFFICE OF CITY ATTORNEY

CITY OF BURBANK

CALIFORNIA

275 East Olive Ave.
Tel: 848-3141
848-1231

November 21, 1972

Mr. William H. Roberge, Jr.
Powell & Becker, Attorneys
1156 Fifteenth Street, N.W., Suite 516
Washington, D. C. 20005

Re: City of Burbank, et al. v.
Lockheed Air Terminal, Inc., et al.
Supreme Court Docket No. 71-1637

Dear Mr. Roberge:

This will serve to confirm that we have no objection to your filing a brief in behalf of National Business Aircraft Association, Inc., as amicus curiae, in support of the appellees in the above entitled action.

In response to your further request we are enclosing a copy of the Jurisdictional Statement which we filed. For anything further, we would suggest that you contact Appellees' counsel, Mr. Warren Christopher of the firm of O'Melveny & Myers, 611 West Sixth Street, Los Angeles, California 90017.

Yours very truly,

SAMUEL GORLICK
City Attorney

By Richard L. Sieg, Jr.
Richard L. Sieg, Jr.
Assistant City Attorney

RLS:mm
Enc

Exhibit 3

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November
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OUR FILE NUMBER

10,010-2

William H. Roberge, Jr., Esq.
Messrs. Powell & Becker
1156 Fifteenth Street, N.W.
Washington, D. C. 20005

Re City of Burbank, et al. v. Lockheed Air Terminal, Inc., et al., Supreme Court of the United States, October Term 1972, No. 71-1637

Dear Mr. Roberge:

Thank you for your letter of October 7, 1972. On behalf of the appellees, we hereby consent to your filing an amicus brief on behalf of your client, National Business Aircraft Association.

Sincerely,

Warren Christopher

Warren Christopher

WC:gg

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1637

CITY OF BURBANK, ET AL., APPELLANTS

v.

LOCKHEED AIR TERMINAL, INC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (A. 410) is reported at 457 F. 2d 667. The preliminary memorandum of the United States District Court for the Central District of California (A. 341) is reported at 318 F. Supp. 914. The final opinion of the district court (A. 375) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1972 (A. 5, 428). Notice of appeal was filed on May 15, 1972 (A. 5). This Court noted probable jurisdiction on October 10, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(2).

QUESTION PRESENTED

The United States will principally discuss the following question:

Whether a municipal ordinance prohibiting the take-off (except in emergencies) of pure jet aircraft between the hours of 11:00 P.M. and 7:00 A.M. at a privately owned airport located within the city's jurisdiction is unconstitutional under the Supremacy Clause because the ordinance seeks to regulate a field that has been preempted by the Federal Aviation Act of 1958, as amended, or because it is in conflict with a preferential runway order issued by the Federal Aviation Administration's airport control tower chief.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant constitutional provisions, federal statutes, and local ordinance are set forth in Appendix A, *infra*, pp. 59–63.

INTEREST OF THE UNITED STATES

The issue in this case is whether the federal government has so occupied the field of air commerce as to preempt State or local governments from exercising their police power to impose a night curfew on the take-off of jet aircraft at privately owned airports within their jurisdiction. It is well established that a very large proportion of aviation activity is under the umbrella of federal preemption; once "a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls" as to which "[f]ederal control is intensive and exclusive." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (Jack-

son, J., concurring). Whether this exclusive federal control extends to the determination whether an aircraft shall be permitted to initiate its journey, given the current state of federal legislation, congressional understanding, and federal administrative practice, importantly affects the division not only of power but of responsibility between federal and state governments. A determination that this problem involves an exclusively federal responsibility would, therefore, influence the approach of the federal government to the execution of such responsibilities.

The issue raised by this case is of concern to the United States not only from the standpoint of the regulation of air commerce, but also because of the active federal interest in noise problems. In the Noise Control Act of 1972, P.L. 92–574 (October 27, 1972), Congress has found (in Section 2) that "inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population," and has declared that "it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare." Congress further found that "while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which requires national uniformity of treatment."

One of the major areas of concern involves airplane noise. According to a study undertaken by the Environmental Protection Agency under the Noise Pollution and Abatement Act of 1970, P.L. 91–604, 84 Stat. 1709, it is conservatively estimated that approximately

7¼ million people in the United States live near airports within a noise contour where widespread complaint about noise can be expected. Report to the President and Congress on Noise, S. Doc. No. 92-63, 92d Cong., 2d Sess., pp. 2–79.

In *amicus curiae* filings in the courts below in this case, the Federal Aviation Administration supported the position of appellees herein that Burbank's ordinance is invalid under the Supremacy Clause, on the grounds that the subject has been preempted by the federal government and that the ordinance conflicts with federal regulation. Subsequently, however, a thorough review of the legislative history underlying the Federal Aviation Act of 1958 and subsequent enactments bearing on the issues has persuaded us that Congress did not intend to preclude local regulation of the sort here entailed, and that, on the contrary, Congress has consistently proceeded on the premise that State and local governments retain the power, in order to shield persons residing around airports from undesirable aircraft noise, to impose night curfews and restrictions on aircraft types that may utilize their airports (as long as there is not any impermissible burdening of interstate commerce). Our primary purpose in filing this brief is to discuss the legislative materials that have led us to this conclusion. The position set forth herein reflects the views of the Department of Transportation, of which the FAA is a constituent agency.

STATEMENT

Hollywood-Burbank Airport ("Hollywood-Burbank" or the "airport") is a privately owned and operated airport located in a thickly populated area. It is entirely within the City of Burbank, except for the northernmost 2,050-foot portion of its north-south runway, which lies in the City of Los Angeles (A. 24 Exh. A, 138–140, 373, 393). It is one of a number of satellite airports to Los Angeles International Airport (A. 238–241).

The airport is used by several commercial air carriers (A. 46, 206, 383) as well as by corporate jet aircraft (A. 149). Since 1965, when the first commercial jet aircraft were introduced at Hollywood-Burbank, the airport has experienced a rapid growth in passengers served, growing to an estimated 1,300,000 passengers in 1970 (A. 142, 148–149, 159). Ninety-seven percent of the 32,000 yearly air carrier operations at the airport are with pure jet aircraft (A. 148).

Increasingly in recent years, noise from jet operations at Hollywood-Burbank Airport has posed a serious problem to the surrounding communities (A. 316–319, 453–462). The area within a five-mile radius of the airport is considered to be noise sensitive (A. 454, 459–460). Beginning in 1967, the chief of the airport control tower, which the Federal Aviation Administration ("FAA") operates, issued a series of non-mandatory runway preference orders governing the assignment of runways for take-offs and landings at the

airport, in an effort to alleviate community complaints about noise (A. 112, 453–462). The last of these orders, issued September 4, 1969, was in effect at the time of adoption of Burbank's night curfew ordinance (A. 392–393, 413). Despite the controller's efforts, the assignment of one runway over another did not diminish complaints, but merely shifted or expanded their locale (A. 318–319, 453–462). The airport's runways in both directions produce flights over residential districts (A. 393, 411).

On March 31, 1970, the City Council of Burbank, in response to continuing complaints about noise from the airport, passed Ordinance No. 2216, which, effective May 4, 1970, prohibited the take-off of pure jet aircraft between 11:00 P.M. and 7:00 A.M., except in emergencies (A. 413). The express purpose of this ordinance was to gain surcease from the noise caused by the take-off of pure jet aircraft during sleeping hours (A. 413).

One regularly scheduled airline departure per week was affected by the ordinance—a flight of the intrastate carrier Pacific Southwest Airlines ("PSA"), which originated in Oakland and departed from Hollywood-Burbank for San Diego at 11:30 P.M. each Sunday night (A. 88, 95–96). The primary impact of the ordinance has been on the late night or early morning departures of business jets, which, prior to the effective date of the ordinance, had accounted for some 60 or more take-offs per month during the proscribed hours (A. 167–168, 327, 332–333, 521).

On May 14, 1970, Lockheed Air Terminal, Inc. (the owner and operator of the airport) and PSA,

later joined by the Air Transport Association of America, filed suit for declaratory and injunctive relief against the City of Burbank and certain of its public officials, claiming among other things that the ordinance violated the Supremacy Clause and the Commerce Clause of the Constitution (A. 1–2, 6–18, 27–35). After a three-day trial, the district court held the ordinance unconstitutional as violating both the Supremacy Clause and the Commerce Clause and permanently enjoined its enforcement (A. 4, 405, 408).

The court of appeals affirmed. In doing so, it did not address the question whether the ordinance imposed an undue burden on interstate commerce, resting its decision solely on Supremacy Clause grounds. The court ruled that "[t]he pervasiveness of federal regulation in the field of air commerce, the intensity of the national interest in this regulation, and the nature of air commerce itself require the conclusion that State and local regulation in that area has been preempted" (A. 417). While it recognized that local governments, when acting as airport proprietors, could "deny the use of [an] airport based on noise consideration," it held that this could not be done through the exercise of the police power (A. 423). The court further held that the Burbank ordinance conflicted with a federal regulation, the runway preference order (A. 426). One judge concurred in the result with respect to this latter point only (A. 427).

ARGUMENT

INTRODUCTION AND SUMMARY

In reaching the conclusion that the night curfew ordinance of the City of Burbank violated the Supremacy Clause by seeking to regulate in a federally-preempted area, the court of appeals relied heavily on the comprehensiveness of the scheme of federal regulation of aviation activities. We agree that Congress, through the Federal Aviation Act, has created a comprehensive system of federal regulation. However, descending from broad generalities about the scope of federal regulation to a more precise analysis of the content of the Act and its underlying legislative history, it becomes apparent that the system of federal regulation is only preemptive in part, and that there are significant areas of concurrent or primary State and local jurisdiction.

Among the areas in which there appears to be a clear federal preemption of State regulation are the following: The regulation of routes, rates, and other economic facets of interstate, overseas, and foreign air carrier operations, which is committed to the jurisdiction of the Civil Aeronautics Board; air traffic control, airspace management, licensing of airmen, certification of aircraft and engines (including noise emission standards), all committed to exclusive federal regulation through the Federal Aviation Administration (FAA).

On the other hand, matters such as the location and size of airports, land use planning around airports, and management of the airports are primarily

left to State and local decision, subject to a degree of federal supervision through such means as conditions in agreements for federal airport funding. As a practical matter, many facets of airport utilization, including control of aircraft noise on and around airports, are subject to concurrent federal and State/local jurisdiction. Federal control is exercised primarily through airspace and air traffic regulation, and State/local control by limiting access to the airport itself or particular facilities thereon.[11]

The imposition of night airport curfews is not a matter that necessarily requires uniform national treatment, since the decision with respect to the different airports around the country will be influenced in part by factors that are variable from airport to airport, such as the land use in the vicinity of the airport and the nature of the air service requirements of the community in which it is located. While the interests affected by the decision whether or not to impose a curfew are not purely local (flights that use the Burbank airport are presumably en route to or from some other city), the balancing of the local community's desire for a tranquil environment and its needs for a flourishing air commerce is surely an im-

[11] To illustrate, the FAA would decide whether the runways are adequate to permit safe operation by aircraft of certain operating characteristics or whether the instrumentation is sufficient to permit operations under certain weather conditions. The local government, ordinarily through its role as airport proprietor, could close a particular runway, impose curfews, or otherwise restrict access to and use of the airport or some of its facilities. The local governmental airport proprietor might bargain away some of these rights through covenants in federal grant agreements.

portant ingredient in the equation, and it would not be irrational for Congress to leave the determination in the hands of State and local authorities except where its resolution by them transgresses some overriding federal interest.

The question of preemption ultimately turns upon the intent of Congress. This congressional intent is sometimes expressed in the enactment itself, sometimes demonstrable from the legislative history, and often left to be inferred by the courts from the structure of the legislative scheme and the nature of the subject matter. In the present case, we are dealing with a fairly comprehensive federal regulatory scheme in which broad, albeit partially unexercised, power to regulate aircraft noise has been conferred upon the Administrator of FAA. However, a review of the legislative history underlying the enactment of the Federal Aviation Act of 1958 and subsequent amendments thereto, as well as the Noise Control Act of 1972, reveals that Congress did not entertain any preemptive intent; rather, it legislated on the assumption that the States would retain concurrent jurisdiction to effectuate noise abatement measures, particularly by means of their control over access to and use of airports. Any finding of preemption is thus precluded by this congressional understanding and intent.

The court of appeals' further finding that the Burbank ordinance is invalid under the Supremacy Clause by virtue of a supposed conflict with the FAA tower chief's preferential runway order is also in error. That order was a limited federal action for noise

abatement objectives, utilizing the FAA's traditional air traffic control powers. It was not, however, a manifestation of a deliberately arrived at federal policy against further noise abatement measures at Burbank. Burbank's ordinance was in fundamental harmony with the purposes of the preferential runway order and also with the national noise policy as recently declared by Congress in the Noise Control Act of 1972. It does not prohibit any activity that is required by federal laws and regulations; there simply is no general federal policy in favor of night flights by jet aircraft over densely populated residential districts irrespective of environmental consequences, nor is there any such specific policy applicable to Burbank. Accordingly, the ordinance does not conflict with governing federal laws or regulations.

The ordinance was also attacked as imposing an undue burden on interstate commerce, a claim that was upheld by the district court and not addressed by the court of appeals. The district court's finding was predicated upon a consideration of the effect of nationwide imposition of curfews, rather than on the particularized effect of Burbank's curfew on commerce. We believe that, in light of the congressional understanding that State and local governments retain some concurrent power to deal with aircraft noise problems through their control over airports, such a blanket approach to the evaluation of the effect of Burbank's curfew was unwarranted. As to the particular effect of the Burbank ordinance, the record does not adequately explore this issue, and the plaintiffs have failed to meet their burden of proof.

402-435—72——2

I

CONGRESS DID NOT INTEND TO PREEMPT LOCAL REGULATION OF AIRCRAFT NOISE BY MEANS OF NIGHT CURFEW ORDINANCES APPLICABLE TO AIRPORTS WITHIN THE JURISDICTION OF LOCAL GOVERNMENTS

A. GENERAL PRINCIPLES OF PREEMPTION

The primary question to which we address ourselves in this brief is whether the area of *exclusive* federal regulation of air commerce encompasses the imposition of restrictions on the use of airports by certain types of aircraft or at certain times of the day. That there is a very substantial segment of air commerce, including all aspects of airspace management, flight navigation, and safety, from which the States are excluded from the exercise of any regulatory power by federal preemption is scarcely subject to dispute. See *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (Jackson, J., concurring). Nor can it be doubted, given the intimate relationship between the operation of aircraft and interstate commerce, that Congress could assume exclusive dominion over various facets of airport regulation, including the subject of operational curfews, if it considered it necessary or desirable to bring such matters within the ambit of centralized federal regulation. The issue in this case, however, is not whether the power to exclude State and local regulation exists, but whether it has in fact been exercised.

In determining the application of the doctrine of federal preemption, "[t]he question in each case is what the purpose of Congress was." *Rice* v. *Santa Fe*

Elevator Corp., 331 U.S. 218, 230. Where, as here, the State or local regulation involves the exercise of traditional police powers, the starting place of the inquiry is the assumption that such powers "were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.*; see also *Head* v. *New Mexico Board*, 374 U.S. 424, 430–431; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142, 146.

Sometimes congressional legislation will explicitly exclude concurrent State or local regulation of a particular subject,[2] while at other times Congress may expressly consent to supplemental, duplicating, or even inconsistent State regulation.[3] More commonly, however, federal statutes do not contain express directives regarding the question, leaving the courts to infer from the nature of the congressional enactment, the character of the subject matter with which it is concerned, and the scope of federal regulatory activity in the field whether preemption is an intended or inherently necessary consequence of the federal legislation. See, *e.g.*, *Rice* v. *Santa Fe Elevator Corp.*, *supra*; *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148; *Hines* v. *Davidowitz*, 312 U.S. 52; *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Campbell* v. *Hussey*,

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[2] *E.g.*, United States Warehouse Act, Section 29, 39 Stat. 490, as amended, 7 U.S.C. 269; Railway Labor Act, Section 2, 44 Stat. 577, as amended, 45 U.S.C. 152.

[3] *E.g.*, Fair Labor Standards Act, Section 18, 52 Stat. 1069, as amended, 29 U.S.C. 218; Labor-Management Reporting and Disclosure Act of 1959, Sections 603(a), 604, 73 Stat. 540, 29 U.S.C. 523(a), 524; Securities Act of 1933, Section 18, 48 Stat. 85, 15 U.S.C. 77r.

368 U.S. 297. See also Bikle, *The Silence of Congress*, 41 Harv. L. Rev. 200 (1927).

The history of congressional legislation touching upon airport/aircraft noise problems reflects a congressional understanding and intention that certain aspects of regulation, including curfews restricting airport use, remain appropriate subjects of State and local regulation. Given this congressional understanding, we believe that the underlying principles of the preemption doctrine compel the conclusion that the Burbank ordinance here at issue does not trespass upon a federally preempted area of regulation.

This is not to say that Congress is unconcerned with aircraft noise problems. As will appear from the ensuing discussion, action has been taken on several fronts by Congress and by the FAA, including the adoption of flight rules designed to accomplish noise abatement and the exercise of control over the design and manufacture of aircraft. Moreover, the entire subject of federal policy on aircraft noise, which ultimately necessitates a balancing of competing considerations of the encouragement of commerce and the maintenance of a healthful environment, is presently under intensive study pursuant to the congressional directive contained in the Noise Control Act of 1972, *supra*. We do not believe, however, that the objectives of Burbank's ordinance are inconsistent with the basic thrust of federal policy, or that the various federal initiatives so far undertaken reflect a policy of excluding local airport curfews at this time.

B. THE HISTORY OF CONGRESSIONAL LEGISLATION TOUCHING THE SUBJECT REVEALS AN UNDERSTANDING AND INTENT THAT STATE AND LOCAL GOVERNMENTS RETAIN POWER TO REGULATE THE USE OF AIRPORTS WITHIN THEIR JURISDICTION BY SUCH MEANS AS NIGHT CURFEWS

1. The early background

The federal government's regulation of air commerce, while marked by steady expansion, has also been marked by concern for the interests and jurisdiction of the States. In discussing the bill which became the Air Commerce Act of 1926, the first congressional legislative venture in the regulation of air commerce, the Senate Commerce Committee stated:[4]

> While the bill gives to the Secretary of Commerce authority to regulate and control civil aircraft engaged in interstate commerce and flying over Government property, care has been taken to avoid constitutional entanglements, and intrastate flying is left to the control of the States. It is hoped that the States will adopt uniform laws and regulations corresponding with the provisions of this bill and the rules and regulations that will be promulgated under it if it becomes a law.

The primary motivation for the 1926 Act was the need to improve aviation safety.[5] The means chosen was the regulation of aircraft and airmen and the development of civil airways; however, no claim was made for exclusive Federal jurisdiction. The role left to the States under the 1926 Act is evident from the

[4] S. Rep. No. 2, 69th Cong., 1st Sess., p. 8.
[5] *Id.* at pp. 2–4.

following comment on the Uniform Licensing Act of 1930, which dealt with State licensing of aircraft and airmen and the issuance of State air traffic rules:[5]

> * * * [T]he act recognized the policy, principles and practices established by the federal Air Commerce Act of 1926. Furthermore it provided for the acceptance of a federal airman's license if offered in lieu of a state license, and directed that issuance of state licenses for aircraft and airmen should coincide as far as practicable with the federal laws. In addition the act exempted from its terms, civil aircraft or airmen engaged exclusively in commercial flying constituting an act of interstate or foreign commerce. [Footnote omitted.]

The growth of aviation in the ensuing decade created strong economic pressures for more comprehensive federal regulation,[7] and Congress responded with the Civil Aeronautics Act of 1938.[8] That Act further narrowed the area of permissible State action. The effect has been described as follows:[9]

> The Civil Aeronautics Act of 1938 wrought a material shifting in the areas of federal and state authority. The Act established the dominance of federal power in the matter of air safety, particularly in the matter of air traffic rules, airworthiness of aircraft, competence of airmen, and the certification of both aircraft and airmen. The Act asserted federal control

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[5] Plaine, *State Aviation Legislation*, 14 J. Air L. and Comm. 334 (1947).

[7] S. Rep. No. 1661, 75th Cong., 3d Sess., p. 2.

[8] Act of June 23, 1938, 52 Stat. 973.

[9] Plaine, *supra* note 6, at 335.

> over the economic regulation of transportation by common carriers by aircraft, granting to the federal aeronautical agencies the important functions of certification of routes and of rate making. As so often happens in the accomplishment of great changes, there were left shaded areas of doubt, where exclusivity of respective jurisdictions was not clear and where dual or joint governmental activity remained a possibility.
>
> In the air safety field, court decisions have supported the construction of the Act which in effect requires federal certification of all aircraft and airmen. In the economic regulatory field, instances of purely intrastate air transportation by scheduled carriers had been and continued to be so negligible as to leave very little of substance upon which state regulation might operate without duplicating federal action. As subjects for fairly full state action, the airport, contract, tort, criminal and tax jurisdictions were generally left undisturbed. [Footnotes omitted.]

The "undisturbed" area of airports was the next object of congressional attention. Significantly, in terms of the balance of federal and State jurisdiction, Congress approached the subject of airports with a carrot rather than a stick. With the Federal Airport Act of 1946,[10] Congress authorized a multimillion dollar assistance program to encourage State

[10] Act of May 13, 1946, 60 Stat. 170. During the 1930s and early 1940s the federal government had engaged in airport development through a variety of public works relief programs and as part of the national defense effort. However, the 1946 Act was the first systematic federal approach to airports.

and municipal development of airports on a matching-grant basis. The object of the program was "to bring about, in conformity with the national airport plan * * * the establishment of a Nation-wide system of public airports adequate to meet the present and future needs of civil aeronautics * * *."[11] The only condition relating to the grantee's right to control the use of its airport was a requirement that "the airport * * * be available for public use on fair and reasonable terms and without unjust discrimination."[12]

In the meanwhile, at least one local governmental entity was exercising its airport jurisdiction for noise abatement objectives. In 1951, when commercial jets were still in the design stage, the Port of New York Authority adopted a regulation that "[n]o jet or turboprop aircraft may land or take off at an air terminal without permission [of the Port Authority]." Hearings before Subcommittees of the House Committee on Interstate and Foreign Commerce on Aircraft Noise Problems, 86th and 87th Congs., p. 5 (hereafter referred to as "House Hearings on Aircraft Noise Problems"). The Port Authority's regulation was adopted in view of the noise history of military

[11] Sec. 4, 60 Stat. 171–172.

[12] Sec. 11(1), 60 Stat. 176. In recognition of the increasing seriousness of the aircraft noise problem, Congress in 1964 added another condition to the Act, requiring assurance from the sponsor that "appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft" (Act of March 11, 1964, P. L. 88-280, Sec. 10(1), 75 Stat. 161).

jets and was intended to spur commercial jet designers to improve the noise characteristics of their aircraft. Pursuant to its regulation, the Port Authority denied landing privileges to unsuppressed prototypes of commercial jets manufactured by De Havilland Aircraft Company and by Boeing (*id.* at 5–6).

2. *The Federal Aviation Act of 1958*

Thus, from the beginning of federal regulation of aviation in 1926 until 1958, there was no federal legislation touching upon the subject of aircraft noise or establishing any basis for recognizing a federal preemption of the field. The Federal Aviation Act of 1958 effected virtually no change in jurisdiction; neither aircraft noise problems nor the balance of federal-State jurisdiction was considered by Congress.[11] Rather, the entire thrust of the 1958 Act was the consolidation and centralization *within the federal establishment* of the responsibility for air-space management, air traffic control, and air navigation systems.

In 1958, Congress' focus was on assuring safety in the chaotic airspace where, in the last year, there had been 971 near collisions reported to the Civil Aeronautics Board and two tragic mid-air collisions between military and civilian planes within a month.

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[11] The sole exception was the Act's elimination of the last vestige of State control of airspace left intact after the 1938 Act. Section 4 of the Air Commerce Act of 1926, which had permitted States to establish non-conflicting airspace reservations to protect State lands, was repealed. 72 Stat. 806. While this action completed the federal preemption of airspace regulation, it had no impact on the subject of State jurisdiction to regulate airports.

Hearings before the Subcommittee on Aviation of the Senate Committee on Interstate and Foreign Commerce, on S. 3880, Federal Aviation Agency Act, 85th Cong., 2d Sess., pp. 40, 51, 65–66, 71–72, 79, 196, 306–308 (hereafter "Senate Hearings on the 1958 Act"). Federal control of that airspace, though pervasive as against State and local authorities, was itself fragmented and diffuse. It was not lack of federal power, but lack of cohesion in the use of that power on the federal level, that posed a threat to the safe use of airspace as to which the federal government had already asserted its "exclusive national sovereignty." 49 U.S.C. 1508(a); S. Rep. No. 1811, 85th Cong., 2d Sess., pp. 5–6.

The efficient use and management of that airspace was also a major congressional concern. The roar of jet aircraft was a distant sound to the 1958 Congress,[14] but the swiftness of the jet, whose commercial operation was imminent, was very much a matter of congressional concern. Senate Hearings on the 1958 Act, pp. 39, 70, 109, 145–148, 156, 160. As the speed and number of aircraft demanding entry into the airspace increased, so to that extent did the available airspace

[14] Although the military had been flying jets for some 10 years, with minor exception their use of jet aircraft had not caused a serious noise problem to persons on the ground. The general separation of military bases from heavily residential areas, and the priority of purely military considerations and specifications in the design of military aircraft, had by and large meant that noise abatement considerations were not prominently associated with these early jet aircraft operations. Cf. *United States* v. *Causby*, 328 U.S. 256; House Hearings on Aircraft Noise Problems, pp. 4–5.

diminish. The airspace was a scare resource. It was, in Senator Monroney's words, an "airspace inviolate," and all those who trespassed there, all those who would seek "to invade that airspace," could do so only with federal permission. Senate Hearings on the 1958 Act, *supra*, p. 369.

These twin concerns of air safety and airspace management prompted enactment of the Federal Aviation Act of 1958. S. Rep. No. 1811, *supra*, pp. 5–6, 13–15. Congress established the Federal Aviation Agency, a single federal regulator (49 U.S.C. 1341), to stand at the portals of the airspace and to guide and direct all those who demanded admission. The comprehensive system of regulation embraced the men who sought to fly in the airspace (49 U.S.C. 1422; 14 C.F.R. Part 61); the type of craft they operated (49 U.S.C. 1423; 14 C.F.R. Parts 21–39); the path they sought to fly (49 U.S.C. 1348(c); 14 C.F.R. Part 91); and their alloted segment of the sky (49 U.S.C. 1348(a); 14 C.F.R. Part 71).

But Senator Monroney, author of the 1958 Act, was of the definite view that the scope of exclusive federal regulation was to be limited and did not include control of the ground, as illustrated by the following colloquy with one of the government's witnesses at the Senate hearings: [15]

> Mr. MACINTYRE. As a practical matter we can't stop the Port of New York Authority * * * if it chooses to use its own money and change its airport layout.

[15] Senate Hearings on the 1958 Act, *supra*, p. 279.

Senator MONRONEY. The Administrator of the Federal Aviation Agency can deny the entrance of flights from that airport into the airways system. He can prohibit that air traffic. They might build the field but they sure couldn't use it. That would not obtain on the military side.

Mr. MACINTYRE. I am not sure that you can deny the airspace to anybody unless you wrote it in the bill.

Senator MONRONEY. This gives the Administrator control over the airspace, therefore he has the right to do just that. *We don't have control over the ground space.* Persons can build anywhere they wish. As I read the act, I think they could still build ground facilities but they wouldn't necessarily be able to get a plane off of it into the air.

Mr. MACINTYRE. I doubt that you have the right of denial of access. That would involve some very nice litigation if you construed this as meaning—

Senator MONRONEY. *Certainly that is the intent of the act, and while we didn't assume to control the ground, we would control the airspace.* [Emphasis supplied.]

The 1958 Act did empower the Administrator of FAA to issue air traffic rules for the "protection of persons and property on the ground" (49 U.S.C. 1348 (c)), and this clause provided the first legislative footing for federal regulation of aircraft noise. However, the adoption of this provision was wholly unrelated to any congressional consideration of aircraft noise problems. Rather, it was offered to provide authority to protect persons and property on the ground from in-

secticides sprayed from the air [16] and was also viewed as providing authority to establish minimum altitudes for aircraft in flight.[17] It affords no basis for finding any congressional intent to preempt State and local aircraft noise abatement actions.

In summary, prior to 1926 the States possessed complete authority to regulate civil (non-federal) aircraft within their borders and the overlying airspace. During the period from 1926 to 1958, Congress gradually asserted federal jurisdiction, although not exclusively in all cases, over the certification of airmen, aircraft, air carriers, airspace and air traffic control. It did not assume any active jurisdiction over airports or the activities thereon.[18] When Congress did decide to enter an area of State jurisdiction, it did so explicitly. The regula-

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[16] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, on H.R. 12616, Federal Aviation Act, 85th Cong., 2d Sess., pp. 267–269.

[17] Senate Hearings on the 1958 Act, *supra*, pp. 246–249.

[18] Section 606 of the 1938 Act (52 Stat. 1011) did authorize the Administrator to "inspect, classify, and rate any air navigation facility available for the use of civil aircraft." The term "air navigation facility" was defined to include, among other things, "landing areas" (Sec. 1(7), 52 Stat. 977). Since the word "airport" was defined to mean a "landing area" (Sec. 1(8)), Section 606 of the Act gave the Administrator authority to inspect, classify, and rate airports as to their suitability for use by civil aircraft. Identical provisions were incorporated in the Federal Aviation Act of 1958 (Secs. 606 (49 U.S.C. 1426), 101(8) (49 U.S.C. 1301 (8)) and 101(9) (49 U.S.C. 1301(9)), respectively). This potential authority was never exercised, and there is no evidence that its enactment reflected any preemptive intent on the part of Congress. In 1970, Congress amended the Act to authorize the Administrator to issue airport operating certificates to airports serving air carriers certificated by the CAB and to issue minimum safety standards for the operation of such airports. 49 U.S.C. 1432. See note 29, *infra*, p. 37.

tion of aircraft noise or the effects of aircraft noise around airports was not the subject of any congressional enactment prior to 1968.[19] Aircraft noise was considered a problem of the ground, not of the air, and if it was dealt with at all by government, it was only through the medium of State and local land use and airport control.

In *Griggs* v. *Allegheny County*, 369 U.S. 84, this Court's holding that the local government operating the airport rather than the United States would be liable for noise flowed from its understanding of the historical roles of the federal and State governments in our national air transportation system. In finding that it was the airport operator who "decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigational easements would be needed" (*id.* at 89), this Court recognized that it was the States and their agencies who were the builders and regulators of airports, and that the federal government had chosen to limit its role to facilitating local airport development through a financial assistance program.

3. Hearings on aircraft noise problems, 1959–1962

Within a year of the first commercial jet passenger flight, the House Committee on Interstate and Foreign Commerce instituted hearings on aircraft noise problems. Extending over three years, those hearings demonstrate that the Federal Aviation Act of 1958

[19] The 1968 aircraft noise legislation is discussed at pp. 30-37, *infra*.

and prior federal law was not understood to have divested the States and their instrumentalities of authority to impose night curfews on jet take-offs for noise abatement purposes. Throughout the hearings all concerned, including the FAA, interpreted the 1958 Act as leaving local noise abatement authority intact, insofar as such authority was predicated on control of access to and use of airport facilities. While the 1958 Act had conferred power on the FAA to take noise abatement action through the issuance of air traffic rules for the "protection of persons and property on the ground" (49 U.S.C. 1348(c)), such authority was considered non-exclusive.

The hearings opened with a recounting by the Port of New York Authority of its early adoption, in 1951, of a rule requiring its permission for the take-off or landing of jet aircraft at New York's International Airport (see pp. 18–19, *supra*). The Port Authority witness next described the terms upon which it was then permitting such operations (House Hearings on Aircraft Noise Problems, *supra*, pp. 7–8):

> The conditions under which the port authority permits these jets to operate at New York International Airport include a mandatory runway use procedure that requires that jet aircraft use runway 25 or runway 22, for overwater takeoffs whenever wind and weather conditions permit. When it is not possible to take off over water, then and only then, takeoffs are permitted on runway 13–R, 31–L, or 7, but only on the condition that they be so planned and conducted that their noise level will not exceed 112 perceived noise decibels. In ad-

> dition, takeoffs involving flight over the communities are limited to the hours between 7 a.m. and 10 p.m. Takeoffs at night are permitted only over water on runways 22 and 25.

Representatives of the FAA testified regarding the actions and the authority of the agency in dealing with aircraft noise problems. The Committee was advised that the agency had taken action to minimize problems arising from jet aircraft noise through the assignment of preferential noise abatement runways and the alteration of flight patterns and altitudes (*id.* at 64–73, 124, 408). Though actions of this nature constituted "the most effective noise abatement program now available to us" (*id.* at 124), there was still an area of action for the States and their instrumentalities. As FAA's Deputy General Counsel explained (*id.* at 670, 699):

> Generally, the line of demarcation is that the Federal Government has control of the navigable airspace and regulates it. The community that owns the airport regulates it. It controls traffic on the ground.[20]
>
> The Federal Government cannot compel a city to have an airport if it doesn't want one. If a city decides it wants to shut down its airport all night the city has the right to do that.
>
> What the Federal Government does is regulate the planes in the air. There is a provision in the Federal Aviation Act that says that the

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[20] Strictly speaking, FAA asserts jurisdiction for air traffic control purposes over traffic "operating in the air or on an airport surface, exclusive of loading ramps and parking areas" (14 C.F.R. 1.1), which is somewhat broader than described by the witness.

> Agency can enact air traffic rules for a number of purposes, one of which is for the protection of persons and property on the ground.
>
> It is that section that our noise abatement departure regulations are based on. When a plane is in the air, our controller will tell it what turns to make to avoid heavily built-up areas, but *whether jets land at all or not at an airport or whether they take off at night or not is up to the municipality.* [Emphasis supplied.]
>
> * * * * *
>
> Now, on the subject whether we could refuse to permit aircraft departures or arrivals at certain hours, yes, I suppose we could. We could refuse to permit them to use the navigable airspace to approach or depart at certain hours. But as I said this morning, we do not, and we do not think we should, because we think it is a local problem—whether it wants to use its airport at night or not.

That line of demarcation was adhered to by the FAA throughout the hearings (*id.* at 376–377, 408–409, 426–429, 670–671).

At the conclusion of its hearings, the Committee reported the results of its investigation and study. H. Rep. No. 36, 88th Cong., 1st Sess. The Committee noted (*id.* at 2–3):

> [N]oise from airplane engines is a more or less severe annoyance to millions of our people * * *
>
> * * * * *
>
> * * * The complaints included interruption of conversations, church services, and school classes. Night time flights were held to interfere

with sleep. And an important source of complaint stems from fear; fear that a low-flying plane may be about to crash into one's house.

The Committee reviewed the action taken by FAA to abate noise—extensive research into improved aircraft design, engine design, and noise suppression devices; establishment of preferential runways; alteration of flight patterns and altitudes; and earlier power reductions on climbout (*id.* at 12–16, 20–22). The Committee found what appeared to be a "consensus that whatever aircraft noise relief is obtainable through air traffic rules changes * * * has been pretty much exhausted. While further changes here or there might bring some minor relief to a few people, this possibility can no longer be viewed as a major aircraft noise abatement tool" (*id.* at 22).

It was the Committee's view that State and local governments, either in the exercise of their police power or in their proprietary capacity as owners and operators of airports, possessed noise abatement powers which could be exercised through such devices as antinoise ordinances, zoning of areas surrounding airports, and imposition of restrictions as to the use of the airport facilities (*id.* at 22–23). The Committee specifically found (*id.* at 27):

> 7.01: The FAA has authority to promulgate air traffic rules and regulations governing the operation of aircraft in flight so as to minimize noise and other hazards to persons and property on the ground.
>
> 7.02: Interstate and international air commerce is considered to be in the sole domain of the Federal Government. The Federal Govern-

ment, however, has not exercised its authority in conjunction with any enactment which would attempt to establish an aircraft noise criterion.

7.03: Until Federal action is taken, the local governmental authorities must be deemed to possess the police power necessary to protect their citizens and property from the unreasonable invasion of aircraft noise. The wisdom of exercising such power or the manner of the exercise is a problem to be resolved on the local governmental level.

7.04: There is no evidence of any effort by any State or municipality to exercise local governmental authority to control the impact of aircraft noise upon the community.

7.05: Airports in the United States, as a general rule, are operated by a local governmental authority, either a municipality, a county, or some independent unit. These airport operators are closer, both geographically and politically, to the problem of the conflict of interests between those citizens who have been adversely affected by the aircraft noise and the needs of the community for air commerce. Some airport operators have exercised the proprietary right to restrict in a reasonable manner, the use of any runway by limiting either the hours during which it may be used or the types of civil transport aircraft that may use it.

7.06: The Federal Aviation Agency has and has exercised the authority to establish a preferential runway system for any airport.

7.07: The local governmental authorities appear to be reluctant to exercise their governmental prerogatives other than police power, to partially relieve its citizens who are anguished by aircraft noise.

The Committee's report concluded by recommending a series of measures by the Federal Government, including research into noise suppression engine design, consideration by the FAA of conditioning the grant of federal airport development funds on the local airport owner's procurement of sufficient avigational easements, and FAA development of a valid measurement of aircraft noise annoyance. With respect to non-federal action, the Committee recommended the exercise of state and local police powers to alleviate the impact of aircraft noise from airports in the community and, "where it is essential to the peace of an adjacent community," the exploration by airport operators, in consultation with FAA, of possible restrictions "on the use of runways with regard to either hours of the day or types of aircraft" (*id.* at 27–28).

The Committee's findings and conclusions are wholly incompatible with the notion that the 1958 Act (or prior federal aviation legislation) had been intended to foreclose State and local authorities from noise abatement measures through control of airports under their jurisdiction.

4. The 1968 noise abatement amendment

In 1968, Congress enacted Section 611 of the Federal Aviation Act, 49 U.S.C. 1431, the first provision of the Act expressly addressed to noise problems. This legislation directed the Administrator of FAA to develop standards for the measurement of aircraft noise and sonic boom and to "prescribe and amend such rules and regulations as he may find necessary for the control and abatement" thereof. While this

legislation strengthened the mandate and authority of federal regulators to move against aircraft noise problems, a review of the underlying legislative history manifests a congressional intent to leave pre-existing State and local powers unimpaired unless they are exercised in a manner that conflicts with the affirmative exercise of federal power under the provision.

The burgeoning growth of aviation and the widespread introduction of jet aircraft into commercial and corporate fleets during the years since the passage of the 1958 Act had greatly exacerbated the problem of aircraft noise. S. Rep. No. 1353, 90th Cong., 2d Sess., pp. 1–2. At the same time, technological advances appeared to offer opportunities to make aircraft significantly less noisy. Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S. 707 and H.R. 3400, Aircraft Noise Abatement Regulation, 90th Cong., 2d Sess., pp. 6–8, 66–68, 82–86. This combination of circumstances led to the adoption of Section 611, the thrust of which was directed to accomplishing the full application of noise reduction technology to aircraft design. S. Rep. No. 1353, *supra*, p. 2.

When the aircraft noise legislation was being studied by the House Committee, the Air Transport Association submitted a proposed alternative to the bill as introduced. Among the changes suggested was one that would make the promulgation of noise standards by the FAA Administrator mandatory. The stated purpose of this suggestion was "to strengthen the role of the Federal Government *in preempting*

the field of aircraft noise regulation." [21] In a letter to the Committee sent March 1, 1968, commenting on the ATA bill, the Department of Transportation expressed its view as to the role of the local community and the airport operator in noise regulation: [22]

> * * * Local communities should, if not inconsistent with overriding national interests, have the option to determine the effects of transportation on their environment. We do not believe that the mere presence of authority in the Federal Government to certify for noise purposes, or the exercise of that authority, should foreclose an airport operator from exercising his judgment or responding to the desires of the community with respect to aircraft noise. An action by an airport proprietor to exclude aircraft which exceed noise levels established by him does not conflict with the Federal authority to regulate air traffic.
>
> The exercise of this and other authority by local communities should continue. Local communities select airport sites and determine where they best will serve community needs. They bear the responsibility for insuring compatible land use in the airport environs. They have the necessary promotional, proprietary, planning and land use authorities to carry out this responsibility. They have a very influential

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[21] Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 3400 and H.R. 14146, Aircraft Noise Abatement, 90th Cong., 1st and 2d Sess., p. 100.

[22] This letter was not reprinted in the published hearings or the Committee report. The full text of the letter is set forth in Appendix B, *infra*.

voice in determining the type of service they want through their appearances in route proceedings before the CAB. In short, given the limits imposed by aeronautical technology, the community can and should continue to bear a heavy share of the responsibility for assuring the compatibility of the air service they seek and enjoy with the environmental objectives of the community.

While the bill as reported out (and as adopted) did utilize the mandatory word "shall" with reference to the promulgation of standards and the adoption of rules, the Committee's explanation of this language neither indicates nor suggests that this directive to the Administrator was intended to preempt State and local regulation (H. Rep. No. 1463, 90th Cong., 2d Sess., p. 5):

> As noted above, the introduced bill merely authorized the establishment of standards, rules, and regulations and their application in the certification process. The bill reported by the committee requires their establishment and application. The basic purpose of this legislation is the control and abatement of aircraft noise and sonic boom. The committee would emphasize that this legislation should not be construed as permissive. Its intent is the reduction of unnecessary aircraft noise and sonic boom. All such noise might well be deemed unwanted. The committee believes that, as a matter of public policy, the goal must be the lowest possible level of disturbance consonant with safety and the public interest. *The committee would not have anyone construe this legislation as a license to*

> *permit noise or sonic boom. Rather, the application of standards, rules and regulations will establish ceilings beyond which noise and sonic boom will not be tolerated.* [Emphasis supplied.]

Moreover, the report makes it quite clear that this legislation, although it conferred broad noise control powers on the Administrator, was focused upon the problem of noise in the context of aircraft design and manufacture (*id.* at 4):[22]

> The noise problem is basically a confiict between two groups or interests. On the one hand, there is a group who provide various air transportation services. On the other hand there is a group who live, work, and go to schools and churches in communities near airports. The latter group is frequently burdened to the point where they can neither enjoy nor reasonably use their land because of noise resulting from aircraft operations. Many of them derive no direct benefit from the aircraft operations which create the unwanted noise. Therefore it is easy to understand why they complain, and complain most vehemently. The possible solutions to this demanding and vexing problem which appear to offer the most promise are (1) new or modified engine and airframe designs, (2) special flight operating techniques and procedures, and (3) planning for land use in areas adjacent to airports so that such land use will be most compatible with aircraft operations. *This legislation is directed toward the primary problem: namely, reduction of noise at its source.* [Emphasis supplied.]

[22] See also S. Rep. No. 1353, *supra*, pp. 2–3.

The question of State and local control over aircraft noise through control over airports was considered at the Senate hearings on this legislation. After discussion of the night curfew at Washington's National Airport, the following colloquy occurred between Senator Pearson and Secretary of Transportation Boyd:[23]

> Senator PEARSON. Just so I understand you, you hope to set standards of measurement of sound, and then you hope to provide for regulations as to sound *per aircraft?*
>
> Secretary BOYD. That is right.
>
> Senator PEARSON. And have those uniform?
>
> Secretary BOYD. That is right.
>
> Senator PEARSON. *And then whatever the local airports have as a restriction, that is something else again.*
>
> Secretary BOYD. Yes sir. [Emphasis supplied.]

Shortly thereafter, Senator Monroney (author of the 1958 Act) asked Secretary Boyd whether the proposed legislation would "to any degree preempt State and local government regulation of aircraft noise and sonic boom?" The Secretary replied: "I would think that any [State or local] authority would be related to the airport itself, Mr. Chairman, but we would like to submit a written opinion on that."[24] The Department's opinion was submitted in a letter dated June 22, 1968,[25] discussed below.

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[23] Senate Hearings on S. 707 and H.R. 3400, *supra*, p. 25.
[24] *Id.* at 29.
[25] *Id.* at 61.

The Senate Committee reported the House version of the bill without amendment. In a section of its report dealing with the relationship of the bill to local government initiatives, the Committee stated:[26]

> * * * In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the Committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local government.
>
> In this regard, we concur in the following views set forth by the Secretary in his letter to the Committee of June 22, 1968 * * *.

The Committee then quoted at length from the Secretary's letter, which expressed the view that, while regulation of the flight of aircraft with respect to noise was preempted, "the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport." S. Rep. No. 1353, *supra*, p. 6.[27]

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[26] S. Rep. No. 1353, 90th Cong., 2d Sess., p. 6.

[27] The Department's letters to the House and Senate Committees spoke in terms of the powers of local agencies acting as airport "proprietors," and the court of appeals relied upon this as a basis for distinguishing and holding preempted airport control undertaken through exercise of the police power. For reasons discussed more fully at pp. 44–49, *infra*, we do not believe this to be a valid distinction. Hollywood-Burbank Airport is to our knowledge the only privately owned airport in the country used by airlines operating jet aircraft, and the Department's attention was not focused upon the problems of local regulation of privately owned airports.

Thus, while the legislation conferred broad authority on the FAA to regulate aircraft noise, its primary focus was upon the accomplishment of this objective through controls directed at the source—aircraft and engine design. The legislation was not designed nor understood by Congress to oust the States from concurrent jurisdiction to deal with the problem in their traditional sphere of airport control.[28] While, under Section 611, the FAA could issue rules and regulations for the control and abatement of aircraft noise at airports, until it does so, the States are free to act.[29]

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[28] The regulations issued by FAA pursuant to its new noise control responsibilities reflect administrative ratification of this view. 14 C.F.R. 36.5 provides:

> * * * the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport.

In the preamble to the regulation, FAA stated (34 Fed. Reg. 18355, November 18, 1969):

> * * * Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is "acceptable," from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce.

[29] The enactment in 1970 of Section 612 of the Federal Aviation Act, providing for the issuance of airport operating

5. The Noise Control Act of 1972

On October 27, 1972, the President signed into law the Noise Control Act of 1972, P.L. 92–574. The consideration and passage of that legislation reflects three factors that are pertinent to the resolution of the preemption issue presented by the instant case: (1) The control of noise is an increasingly important federal policy;[30] (2) Congress does not as yet feel that adequate information exists upon which to base any comprehensive federal program of aircraft noise control and desires that the question receive further study; and (3) in the interim, Congress does not wish to impair the existing balance of federal, State, and local power to deal with aircraft noise problems. Each of these factors supports the conclusion that Burbank's ordinance does not operate in an area of regulation that is federally preempted at the present time, and that its requirements are not incompatible with federal policy on control of aircraft noise.

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certificates by the Administrator, has given him an additional method of regulating airport noise should he decide to do so. Thus, by exercising the authority conferred by Section 611 to apply noise standards and regulations "in the issuance, amendment, modification, suspension, or revocation of any certificate * * *," the Administrator could include noise standards or regulations in an airport operator's certificate issued under Section 612. The adoption of Section 612, however, does not reflect a congressional intent to preempt the area of noise regulation; the legislative history of that provision makes it clear that safety of flight was the only consideration underlying the new certification requirement, and that Congress gave no thought to airport-related noise problems in its consideration of the legislation. See H. Rep. No. 601, 91st Cong., 1st Sess., pp. 11–12.

[30] See Section 2 of the Act, App. A, *infra*, pp. 59–60.

Section 7 of the Noise Control Act of 1972 (App. A, *infra*, pp. 60–62) deals with the subject of "Aircraft Noise Standards." Subsection (a) directs the Administrator of the Environmental Protection Agency ("EPA") to conduct a study, the results of which are to be reported to Congress within nine months after enactment of the Act, covering the following topics:

> * * * (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phase-out of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. * * *

Subsection (b) amends Section 611 of the Federal Aviation Act to afford EPA a consultative role in FAA's issuance of aircraft noise standards and regulations, in order to assure that those standards and regulations properly consider the environmental impact of aircraft noise on the public health and welfare.

That Congress was not prepared to legislate comprehensively on the subject of aircraft noise or, for the time being, to alter by statute the previously existing balance of federal and State authority is clear from the committee reports. In reporting out the Noise Control Act of 1972, the Senate Committee stated (S. Rep. No. 92–1160, 92d Cong., 2d Sess., pp. 10–11):[21]

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[21] See also 118 Cong. Rec. (daily ed.) S. 17758 (remarks of Senator Tunney).

The Committee considered approaches to controlling aircraft noise based on a concept of cumulative noise exposure, involving the level of noise from aircraft to which individuals in the areas surrounding airports are exposed and the effects of such exposure on public health and welfare. While methods other than noise emission standards can be effectively utilized to reduce aircraft noise, the Committee felt that it had insufficient knowledge as to the precise regulatory mechanism for cumulative aircraft noise exposure. Therefore, the Committee included in the bill, in place of any regulatory scheme dealing with community noise around airports, a one year study by the EPA of the implications of identifying and achieving levels of cumulative noise exposures around airports. The results of this study, submitted to the Committees on Public Works and Commerce of the Senate and the Committee on Interstate and Foreign Commerce of the House with legislative recommendations, will form the basis for any legislation on aircraft noise in the next Congress.

* * * * *

States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill.[35] *This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Fed-*

[35] This sentence refers to the preemption provision in the Senate version of the bill, which was not ultimately adopted. See note 36, *infra*.

> *eral government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.* [Emphasis supplied.]

The House bill had been reported earlier with an identical disclaimer against altering the pre-existing balance of federal and State authority. H. Rep. No. 92-842, 92d Cong., 2d Sess., p. 10.

As discussed above, the pre-existing balance recognized the legitimacy of night curfews imposed by the States and their instrumentalities. In considering the Noise Control Act of 1972, Congress acted upon the assumption that States and localities do presently have such authority.

During the Senate hearings on the Noise Control Act, an EPA representative testified that it understood that night curfews were within the State police powers:[33]

> The reduction of noise associated with air transportation involves considerably more than engine source control even though that in itself is significant. Involved could be changes in landing and takeoff procedures, an FAA responsibility; airspace utilization and allocation around airports, a responsibility shared by the FAA and the airport operator; or modification in schedules, which is a function of the airlines, the airport operator, and the CAB.

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[33] Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, on S. 1016, Noise Pollution, 92d Cong., 2d Sess., p. 330 (hereafter "Senate Hearings on the 1972 Noise Control Act"); see also *id.* at 347–348, 352.

There are also other possibilities, such as the imposition of curfews, and the use of special licenses, which are the function of State and local governments. [Emphasis supplied.]

Night curfews were already in existence at Washington National Airport, Morristown, New Jersey, and London, England. Similar curfews were said to exist in "many major European cities." 118 Cong. Rec. (daily ed.) H. 1534; see also Hearings before the Subcommittee on Public Health and Environment of the House Committee on Interstate and Foreign Commerce, on H.R. 5275, Noise Control, 92d Cong., 1st Sess., p. 485.

The persistence of the noise problem had led to the development of highly sophisticated State and local efforts at regulating ambient noise levels, which in turn gave Congress further pause before changing the regulatory balance that had been struck in the Federal Aviation Act of 1958. Senate Hearings on the 1972 Noise Control Act, pp. 115–154, 185–267. For example, Congress was informed that the State of California had recently enacted airport ambient noise control standards (Calif. Pub. Utilities Code, Section 21669), which were soon to be made effective. *Id.* at 98, 105, 166. Senator Tunney, the Senate manager of the Noise Control Act of 1972, made clear his position that he would not support legislation that would preempt California's efforts. *Id.* at 329.

On the House floor, Congressman Collier, who had participated in the 1962 aircraft noise hearings,[34] recalled:

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[34] House Hearings on Aircraft Noise Problems, *supra*, at 287 and 671. Mr. Collier's statement, quoted in the text, regarding

This problem of establishing curfews and going to the FAA seeking regulations which provide for relief from the noise problem in the area is nothing new. I served on the Aviation Subcommittee 15 years ago when we were dealing with this very problem. But I think we ought to get one thing straight: We have a curfew at Washington National Airport because Washington National Airport and Dulles are in a totally unique position. They are not municipally operated but instead are under control of the Federal Government. O'Hare International Airport is operated by the Chicago Municipal Airport Authority. There would be not one plane going in or out of O'Hare field after 11 o'clock at night if the local airport authority did not approve it. So it is well and good to suggest bringing the complaints to Washington and have the FAA do the job when in reality the *responsibility presently exists with the local airport authority.*

So let us not beat around the bush here. If you want this job done, *I suggest that if you have an interest in providing this relief, you should go to the Chicago Airport Authority, which is an arm of the city administration of Chicago, get relief at the source. They have the power to stop any flights after 11 o'clock, if, in fact, we want a curfew.* I think that ought to be made eminently clear, and I hope [I] have done so today. [Emphasis supplied.] [35]

his service on the Aviation Subcommittee in 1957 appears to be an inaccurate recollection.

[35] 118 Cong. Rec. (daily ed.) H 1535–1536.

In sum, far from creating or reinforcing a comprehensive scheme of federal regulation of aircraft noise, the Noise Control Act of 1972 is most significant for its enunciation of a federal policy to minimize such noise wherever practicable and for the determination that a comprehensive federal policy must await further study of the problem. Such further study may well result in the adoption of a comprehensive scheme and a determination to exclude concurrent or supplementary State regulation, but so far Congress has not excluded such regulation in the traditional spheres of State and local authority, including control of airports.[26]

C. THE PROPRIETARY-POLICE POWER DISTINCTION RELIED UPON BY THE COURT OF APPEALS IS NOT VALID

The foregoing review of the legislative history of congressional enactments touching the subject of aircraft noise abatement indicates that Congress has at no time intended to preempt State and local authori-

[26] While we agree with the Supplemental Brief of the Attorney General of the State of California that the history of the Noise Control Act of 1972 evinces a congressional intent to leave intact local regulatory power such as that exercised by Burbank in this case, we do not, as he does, reach this conclusion on the basis of the omission from the bill as enacted of the preemption provision contained in the Senate version. That provision (see State's Supplemental Brief, p. 15) was addressed to regulation of noise emission directed at aircraft and engine design, with respect to which the FAA had already been given comprehensive regulatory power in the 1968 amendment to the Federal Aviation Act. Had the provision been adopted, State and local noise abatement actions through airport control would not have been affected. The failure to adopt it is thus of no significance with regard to the issues presented by the present case.

ties from acting against aircraft noise by denying the use of their airports to certain types of aircraft or at certain times of the day. That history has not, however, focused upon the distinction between airport control in a proprietary capacity and airport control by means of the exercise of police power, and several references to the power of State and local governments to restrict airport use are framed in terms of the local government as an airport proprietor. See, *e.g.*, note 27, *supra*, and accompanying text.

The court of appeals, in response to Burbank's argument that the legislative history indicates a non-preemptive congressional intent, relied upon this distinction to explain away the thrust of the Senate report's approving reference to the letter of the Secretary of Transportation (S. Rep. No. 1353, *supra*). That letter had asserted continuing State and local authority in the area of noise regulation through airport control. The court stated (A. 422–423):

> A State or local public agency, as the proprietor of an airport, can deny the use of its airport based on noise consideration; a State or local government cannot use its police power to do so. [Footnotes omitted.]

We cannot agree that this distinction applies to the determination whether the Burbank ordinance seeks to regulate in a federally preempted area. In the first place, it leads to a logically bizarre result. Since nearly every major airport in the United States is governmentally owned (Burbank being the most significant, if not the only, exception among airports used by certificated air carriers), the result of the court of

appeals' reasoning is that there is a federal preemption policy affecting at most a handful of airports in the entire nation.[37] The considerations of uniform national policy or centralized federal decision-making that ordinarily support preemption would not be furthered by a preemption having such insignificant national impact, and Congress should not be assumed to have legislated such a result in the absence of clear evidence of such intent.

Moreover, while the letter from the Secretary of Transportation quoted in the opinion of the court of appeals spoke in terms of local public agencies acting "as proprietors," the context indicates that the intention was to distinguish between local governmental entities having jurisdiction over an airport and those not having *any* jurisdictional tie. Such a reading accords with the fact that practically every major airport in the country was owned by a local government or a local or regional authority; we have, indeed, found nothing in the legislative history suggesting that any thought or concern was addressed to problems that might be presented by privately-owned airports. Furthermore, such a reading is consistent with the prevailing concern, at the time the letter was sent, about efforts by communities adjoining airports to impose restrictions impinging upon federal regulation of aircraft flight.

This concern is evidenced by the letter's reference to the decision of the district court in *American Airlines,*

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[37] There are, of course, a number of privately owned airports throughout the country that serve general aviation only; but these airports do not present such serious noise problems.

Inc. v. *Town of Hempstead,* 272 F. Supp. 226 (E.D.N.Y.), affirmed, 398 F. 2d 369 (C.A. 2), certiorari denied, 393 U.S. 1017, striking down an ordinance that sought to impose noise standards on aircraft passing over the town en route to or from New York's Kennedy International Airport. See also *American Airlines, Inc.* v. *City of Audubon Park, Kentucky,* 297 F. Supp. 207 (W.D. Ky.), affirmed *per curiam,* 407 F. 2d 1306 (C.A. 6), certiorari denied, 396 U.S. 845; *Allegheny Airlines, Inc.* v. *Village of Cedarhurst,* 238 F. 2d 812 (C.A. 2). The cited decisions all involved efforts by local governments to regulate "the flight of aircraft," which, as the letter correctly noted, was a field already preempted.[38] None of these decisions is at all inconsistent with a holding that Burbank has the power to impose a night curfew on its airport. This context fully explains the terminology employed in the letter, and we believe it is unwarranted to infer any intent to exclude local governments having police power jurisdiction over airports from exercising such powers for noise abatement objectives.[39]

We recognize that *Griggs* v. *Allegheny County,* 369 U.S. 84, imposing compensation liability for noise

[38] The decision of the court of appeals in the *Hempstead* case was rendered approximately three weeks after the letter of the Secretary of Transportation was sent. It rested solely on the ground of conflict between the ordinance and federal air traffic regulations and specifically declined to affirm the preemption finding of the district court. See 398 F. 2d at 376, n. 4.

[39] The abence of such intent is confirmed by the fact that the California airport noise control law was before Congress in its consideration of the Noise Control Act of 1972 and was assumed not to be within a preempted area. See p. 42, *supra.*

easements on governmental airport proprietors, cited by the court of appeals (A. 423, n. 8), affords a ground for distinguishing between local governmental action taken in a proprietary capacity and that reflecting an exercise of police power.[40] However, the existence of such a basis for distinction does not necessitate that the distinction in fact be drawn in every instance, and there are several reasons for not doing so here. First, there is no affirmative evidence of congressional intent to prohibit local governments from exercising police power over airports within their boundaries (as distinct from the exercise of such power over "the flight of aircraft" through the federally sovereign airspace overhead). Second, it is quite clear that the status of a local government as a proprietor, *Griggs* notwithstanding, would not insulate it from the exercise of federal control, to the extent Congress deems such control desirable in the execution of its powers and responsibilities under the Commerce Clause. Finally, as noted above, perpetuation of a proprietorship-police power distinction makes no practical sense in terms of the development of a rational and uniform federal policy, since the preemption thereby created would have such marginal effect.[41] The distinction drawn by the court of appeals is thus not supported by the legislative history and not consonant with the practicalities of the situation.

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[40] The *Griggs* decision was not, of course, in any way directly concerned with police power-proprietorship distinctions.

[41] Thus, the night-time flight restrictions which the Department of Aeronautics of the City of Los Angeles, proprietor of Los Angeles International Airport, plans to put into effect

II

BURBANK'S ORDINANCE IS NOT IN CONFLICT WITH THE TOWER CHIEF'S PREFERENTIAL RUNWAY ORDER

In addition to invalidating the Burbank night curfew ordinance on preemption grounds, the court of appeals further held that the ordinance violated the Supremacy Clause because it was in conflict with an informal runway preference order issued by the Tower Chief at the airport. This order directed tower personnel "normally" to assign runways in such a manner that aircraft would take off in and land from a westerly direction; to "make every effort" to have jet aircraft arrive from the west; and to have jet aircraft depart toward the west "as much as possible during the period from approximately 2300 to 0700 local time when people are asleep" (although the order was applicable at all times of day.) If a pilot requested a departure to the east, the controller was to "honor the request, traffic permitting, but inform the pilot that the runway is 'noise sensitive'." The order was expressly prompted by noise abatement considerations and stated that the procedures it recommended "are designed to reduce the community exposure to noise to the lowest practicable minimum" (A. 412).

The court of appeals, quoting from *Hines* v. *Davidowitz, supra,* 312 U.S. at 67, stated that the ordinance

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on April 29, 1973, would pass muster under the rationale of the court of appeals even though that airport is the third busiest air carrier airport in the United States and in 1971 handled twelve times as many air carrier operations as Hollywood-Burbank. It seems to us highly unlikely that Congress would have intended a federal preemption that fails to reach this situation, while invalidating Burbank's ordinance.

"stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress" (A. 426). It also construed the runway preference order to represent a conscious "balance set by the FAA among the interests with which it is empowered to deal," in short, an affirmative determination that there should be no further restriction on aircraft operations at Burbank for noise abatement reasons. Neither of these conclusions is, we believe, warranted in the circumstances of this case.

In the 1958 Act, FAA was given authority to prescribe air traffic rules for the protection of persons and property on the ground (49 U.S.C. 1348(c)). Between 1958 and 1968, that authority was exercised only to the extent of establishing preferential runway requirements at a few selected noise-sensitive airports. These limited actions were taken concurrently with a tacit acceptance of noise control regulations imposed by airport operators such as the Port of New York Authority.[42] Moreover, FAA's view of its limited and non-conflicting role in the noise abatement area was made clear in its assertions to Congress, in connection with the consideration of the noise abatement amendment to the Federal Aviation Act, regarding the continuing power of airport operators to regulate noise at their facilities.[43]

With the passage of Section 611, FAA was given broad authority to regulate aircraft noise. The first

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[42] See pp. 18–19, 25–26, *supra; Port of New York Authority* v. *Eastern Air Lines, Inc.*, 259 F. Supp. 745, 750 (E.D.N.Y.).

[43] See the letters from the Department of Transportation to the congressional committees quoted at pp. 32–33 and 36, *supra;* also pp. 26–27, *supra.*

implementation of this authority (14 C.F.R. Part 36) was limited to prescribing noise emission standards applicable to aircraft certificated after 1969. In issuing these regulations, FAA specifically disavowed any attempt to preclude airport operators from taking such additional measures as they might deem necessary, "in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce" (34 Fed. Reg. 18355), to deal with noise problems generated by their airports. This determination to leave room for concurrent State and local regulation of aircraft noise through control over airports was consonant with the policy declared in the House report on Section 611 that the federal action should not be construed "as a license to permit noise" (H. Rep. No. 1463, *supra*, p. 5) but should merely be considered to establish noise ceilings."

In the context of past FAA practices and of its often enunciated position regarding the continuing role of local authorities in adopting noise abatement measures based upon airport control, the runway order was not intended to preclude further regulation by the airport operator (or, in Burbank's case, by the valid exercise of local police power over the airport operator). The "lowest practicable minimum" language relied upon by the court of appeals simply did not represent any consideration and rejection of the possibility of a locally imposed curfew on night operations; rather, the language reflected a conclusion that nothing more could practically be accomplished by means of different runway preference arrangements

" See pp. 33–34, *supra*.

or other conventional air traffic and airspace management procedures. Any rejection by FAA of night curfews as a means of accomplishing noise abatement at Burbank would have represented a major change in federal policy and certainly would have been stated explicitly.[45]

In conclusion, nothing in the Burbank ordinance runs counter to the purposes of any congressional legislation in the area or any regulations of the FAA. The ordinance neither seeks to authorize conduct that federal regulations prohibit nor to require the cessation of practices dictated by federal rules. On the contrary, the ordinance represents the exercise of local jurisdiction of a sort that Congress has specifically seen fit not to disturb, directed at accomplishing a purpose in harmony with the most recent congressional declaration of policy regarding noise problems (Sec. 2 of the Noise Control Act of 1972, App. A, *infra,* pp. 59–60).[46]

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[45] This is not to say that FAA lacks the power to impose night curfews or to reject their imposition. We believe that Section 611 confers such power. See, *e.g.*, Remarks of Senator Tunney, 118 Cong. Rec. (daily ed.) S18644. So long, however, as the federal power remains unexercised, we believe that a finding of conflict cannot stand.

[46] Two decisions of district courts on similar issues reached the conclusion that airport use restrictions imposed by the Port of New York Authority were not in conflict with FAA regulations addressed to similar objectives. In *Aircraft Owners & Pilots Ass'n* v. *Port Authority of N.Y.*, 305 F. Supp. 93 (E.D. N.Y.), the court upheld a $25 landing fee imposed by the Port Authority on small aircraft seeking to use any of New York's three air carrier airports during certain peak traffic hours, notwithstanding the fact that the FAA had promulgated a high density regulation permitting a certain number of landings each hour by aircraft of that type. The court upheld the Port Authority's fee as "[u]nited in general purpose" with the federal regulation. *Id.* at 105.

III

THE VALIDITY OF THE BURBANK ORDINANCE SHOULD BE ASSESSED ON THE BASIS OF ITS SPECIFIC IMPACT ON COMMERCE RATHER THAN ON THE BASIS OF THE THEORETICAL IMPACT OF NATIONWIDE CURFEWS

The district court held that Burbank's night curfew ordinance, in addition to being invalid under the Supremacy Clause on preemption and conflict grounds, was also invalid under the Commerce Clause as an undue burden on interstate commerce (A. 405). In so holding, the court relied not on the effect of Burbank's ordinance itself upon interstate commerce (A. 366), but on the effect that nationwide imposition of such curfews would have on commerce (A. 404). The court of appeals, stating it was deciding the case solely upon Supremacy Clause grounds (A. 414), did not discuss the Commerce Clause question.

The Supremacy Clause could invalidate the Burbank ordinance only if the federal power under the Commerce Clause had been exercised in a way that reflects a congressional determination to oust the states of their normal regulatory authority over local noise under their police powers. Cf. *The Slaughter-House*

In *Port of New York Authority* v. *Eastern Air Lines, Inc.*, *supra*, 259 F. Supp. 745 (E.D.N.Y.), the court upheld a prohibition on the use of a runway at LaGuardia Airport, notwithstanding the existence of an FAA preferential runway order involving the runway. The court relied in part on a letter from the Administrator of FAA advising that "in making the runway available for the fullest use required by safety considerations, we are not directing that the runway be used." *Id.* at 753. Similarly, in the instant case, the preferential runway order was not a directive that the runways be used, but merely established preferences in the event they are in fact to be used.

Cases, 16 Wall. 36. Thus, the holding of the court of appeals necessarily reflects the conclusion that "Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action." *Oregon-Washington R.R.* v. *Washington,* 270 U.S. 87, 101.

As we have argued in this brief, we do not think that Congress has exercised its power over interstate commerce so as to bar the City of Burbank from adopting its anti-noise ordinance. In making this argument, we contend only that neither Congress nor the federal regulatory authorities have thus far exercised their full authority under the commerce power to deal with this subject. The power of Congress over interstate commerce is plenary and supreme. But there are some things that the States can regulate until Congress takes over. The question in this case is not one of the power of Congress, but of the extent that Congress has exercised that power.

We have no doubt that Congress at any time could adopt legislation expressly excluding some or all local airport curfews. Congress has conferred extensive power under Section 611 of the Act upon the Administrator of the Federal Aviation Administration to deal with noise problems. The Administrator, however, has not yet exercised that power by means of regulations directed at airport noise, although he is free to do so at any time. As the legislative history previously discussed indicates, the mere conferral of authority on the Administrator was not intended to oust the States of power to deal with airport noise.

The Commerce Clause of its own force and without regard to any action by Congress may preclude state

action that unduly burdens interstate commerce. To the extent that the district court's invalidation of the Burbank ordinance may have rested upon this theory, the court of appeals did not decide the issue. We submit, however, that the Burbank ordinance is not invalid as, by itself, an undue burden on interstate commerce.

"State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 448. There is no suggestion that the ordinance discriminates in any way against interstate commerce, and, in actual operation, the ordinance has not been shown to have accomplished a significant disruption of interstate commerce. Only one scheduled airline flight per week was affected, and that was an intrastate operation by a carrier not certificated by the Civil Aeronautics Board. Otherwise, the impact of the ordinance was confined to a relatively small number of business jet operations, and the plaintiffs failed to show that the prohibition of these flights resulted in any perceptible impact on commerce.[47]

[47] The record is devoid, for example, of any analysis of the actual impact of any diversion or cancellation of business flights resulting from the curfew ordinance. Conceivably, the need to divert or cancel some of its flights might lead a corporation to move its entire fleet to another airport in the area to avoid crew or aircraft positioning or maintenance problems. Alternatively, to avoid these problems the curfew might require ferry flights between airports during non-prohibited hours and result in a substantial increase in operating costs—and noise. Without a determination of these facts, one can only speculate as to the actual impact of the ordinance on business jet operations.

Compare *Huron Cement, supra*, with *Florida Avocado Growers* v. *Paul, supra*, 373 U.S. at 153–156.

It is argued that the ordinance should be evaluated not on the basis of its negligible individual effect, but on the basis of the effect on commerce of nationwide adoption of such curfews.[48] While such an approach might be appropriate in some cases, we believe it is not correct in the present case. As we have previously indicated, we do not believe that maintenance of an effective national air transport system requires prohibiting a curfew at every airport; we do not think that all airports need be treated alike, or that a curfew is necessarily burdensome, *per se*. Moreover, the background, detailed at length above, of congressional understanding that local authorities retain power to effectuate noise abatement through their control of airports, including measures such as curfews, means, at a minimum, that a particular curfew such as Burbank's should be evaluated on the basis of its specific impact rather than on the basis of the theoretical effect of nationwide curfews.[49]

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[48] As in *Huron Cement, supra*, the argument regarding nationwide adoption of similar ordinances was not supported by actual instances, but was predicated upon speculation about ordinances or rules not yet in existence.

[49] In considering the specific impact of a curfew ordinance, it would be appropriate to consider it in relation to other existing curfews.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1973.

APPENDIX A

Article I, Section 8, Clause 3 of the Constitution of the United States reads as follows:

> The Congress shall have power * * *
>
> * * * * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article VI, Clause 2 of the Constitution of the United States reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Noise Control Act of 1972, P.L. 92-574 (Oct. 27, 1972), reads as follows:

> (a) The Congress finds—
>
> (1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;
>
> (2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and
>
> (3) that, while primary responsibility for control of noise rests with State and

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local governments, Federal action is essential to deal with major noise sources in commerce control of which requires national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this Act to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

Section 7 of the Noise Control Act of 1972 reads in pertinent part as follows:

(a) The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act.

(b) Section 611 of the Federal Aviation Act of 1958 (49 U.S.C. 1431) is amended to read as follows:

"CONTROL AND ABATEMENT OF AIRCRAFT NOISE AND SONIC BOOM

"SEC. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

"(2) The FAA shall not issue an original type certificate under section 603(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed

standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d)."

* * * * *

49 U.S.C. 1348 reads in pertinent part as follows:

§ 1348. Airspace control and facilities.

(a) Use of airspace.

The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rules, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

* * * * *

(c) Air traffic rules.

The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

* * * * *

Section 20–32.1 of the Burbank Municipal Code reads as follows:

(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(b) Airport Operator Prohibited from Allowing Take-Offs.

It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(c) Exception: Emergencies.

This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off.

APPENDIX B

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., March 1, 1968.

Hon. SAMUEL N. FRIEDEL,
Chairman, Subcommittee on Transportation and Aeronautics, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I refer to your request for this Department's comments on H.R. 14146, a bill relating to aircraft noise regulation. This is a bill proposed by the Air Transport Association of America (ATA) in testimony before the Transportation and Aeronautics Subcommittee last fall.

The ATA bill would require the Administrator of the Federal Aviation Administration to prescribe standards for the measurement of aircraft noise and sonic boom and to issue aircraft type certificates if the aircraft for which the certificate is sought meets noise standards. It would also authorize the Administrator to issue an order amending, modifying, suspending, or revoking an aircraft type certificate if such action was necessary "to encourage progress in aircraft noise or sonic boom abatement" and if required in the public interest. Such orders would be subject to appeal to the National Transportation Safety Board and subsequent judicial review. The ATA bill would prohibit the Administrator from amending, modifying, suspending, or revoking any airworthiness certificate for purposes of aircraft noise or sonic boom abatement.

The Department is opposed to the ATA version of the noise abatement bill for a number of reasons:

1. The ATA bill would vest the authority for regulation of aircraft noise and sonic boom in the Administrator of the Federal Aviation Administration rather than the Secretary of Transportation. ATA offers as the reasons for this change from the Administration's bill the arguments that it would require the issuance of two type certificates, one for noise and one for safety, and that, in authorizing the Secretary to promulgate noise and sonic boom regulations, it could operate to subvert safety considerations to noise and sonic boom judgments.

Only one certificate would be issued, not two. The Secretary's authority under existing statutes to carry out operating programs has been routinely delegated to the Administrators of the modal administrations within the Department. In the same manner the administration of aircraft noise and sonic boom certifications would be operationally carried out by the Administrator of the Federal Aviation Administration in conjunction with his present activities relating to air safety. FAA personnel regularly engaged in certification activities would simply apply the noise and sonic boom standards in the course of their certification work. The practical administrative effect, therefore, would be similar to that proposed in the ATA bill. The difference, and we believe it to be a significant one, is that final decision-making authority with respect to noise abatement and sonic boom standards would be available to the Secretary should he choose to exercise it.

The ATA argument that safety considerations may be ignored if the Secretary is authorized to establish aircraft noise and sonic boom standards is difficult to understand. First, it overlooks the fact that the De-

partment is totally committed to assuring safety in aviation and all other modes of transportation. Second, it overlooks the fundamental manner in which noise standards and safety standards interact. Both noise standards and safety standards must be set with full knowledge of, and complete reliance on the state of the aeronautical art. It would be clearly unreasonable to establish a noise standard having an adverse effect on safety which could not be corrected or compensated for by our existing technical knowledge. The real issue which is present, even in our current certification processes, concerns the cost of complying with a standard and whether the benefit is worth the added cost.

The FAA Administrator, acting under delegation from the Secretary, would not be free to set a noise standard without taking into consideration all its costs, including those necessary to maintain an adequate level of safety. To assume that he or the Secretary would fail to weigh safety considerations, or weigh and then disregard them, is simply untenable. The need for compensating measures necessary to maintain safety, and their costs, would have to be considered in determining the reasonableness of the Government's action to apply a noise standard.

In vesting authority directly in the Administrator rather than the Secretary, the ATA bill is attempting to draw an analogy from the Department of Transportation Act. However, the logic of the statutory delegation of certain safety functions to the modal Administrators in the Department of Transportation Act, which was to insulate the safety regulatory function, has no application in the aircraft noise area. Congress has specifically directed the Secretary to develop a national transportation system which is compatible with other national objectives, one of the fore-

most of which is improving the quality of our environment. The control of aircraft noise and sonic boom raises fundamental questions as to the compatibility of air transportation with the rest of our environment. The judgments to be exercised with respect to the environmental compatibility of our transportation systems are precisely the ones which are not best reserved to the Administrators of the modes of transportation involved. These broad environmental issues require a balancing of national interests, for which the Secretary must assume the ultimate responsibility within the Department.

2. The ATA bill seeks to make mandatory the imposition of aircraft noise and sonic boom certification. ATA argues that this is necessary in order to achieve maximum preemption by the Federal Government of the field of aircraft noise regulation. As a practical matter, and as ATA concedes in its testimony, the only regulatory authority left to local communities or airport operators is the authority of the airport operator, in the exercise of its proprietary function, to limit on noise grounds the kind of aircraft which may use its facility. The Department is firmly convinced that such authority in the airport operator should continue. Local communities should, if not inconsistent with overriding national interests, have the option to determine the effects of transportation on their environment. We do not believe that the mere presence of authority in the Federal Government to certify for noise purposes, or the exercise of that authority, should foreclose an airport operator from exercising his judgment or responding to the desires of the community with respect to aircraft noise. An action by an airport proprietor to exclude aircraft which exceed noise levels established by him does not

conflict with the Federal authority to regulate air traffic.

The exercise of this and other authority by local communities should continue. Local communities select airport sites and determine where they best will serve community needs. They bear the responsibility for insuring compatible land use in the airport environs. They have the necessary promotional, proprietary, planning and land use authorities to carry out this responsibility. They have a very influential voice in determining the type of service they want through their appearances in route proceedings before the CAB. In short, given the limits imposed by aeronautical technology, the community can and should continue to bear a heavy share of the responsibility for assuring the compatibility of the air service they seek and enjoy with the environmental objectives of the community.

This combination of local authority and local interest provided the rationale for the Supreme Court's decision in *Griggs* v. *Allegheny County* in which the Court found the local airport authority, rather than the Federal Government, responsible for a "taking" of property due to aircraft noise. It would be unwise to take action which could raise argument undermining this rationale. We believe that total preemption of the aircraft noise regulatory field by the Federal Government, as recommended by ATA, could be so regarded.

3. The scope of the bill proposed by ATA is too narrow in that it authorizes only prospective noise abatement action. The Department believes that effective control of aircraft noise and sonic boom requires as a minimum (1) the authority to apply noise standards, rules, and regulations to the issuance of type certificates, both prospectively and retroactively to the date of the application therefor, and (2)

the authority to prescribe standards, rules, and regulations affecting the operation of aircraft as may be necessary.

While quite obviously any governmental decision to require the retrofitting of existing aircraft to reduce noise levels would have to be very carefully weighed from the standpoint of the benefits to be gained versus the costs necessarily imposed, the authority to do so ought to be available should technology and circumstances indicate that such retrofitting was necessary in the public interest. Industry and the public would be protected from the irresponsible exercise of that authority by the appeals permitted either to an impartial board or to the courts, as the case may be.

We would strenuously object to the ATA proposal prohibiting an action to amend, modify, suspend, or revoke an airworthiness certificate for noise abatement or sonic boom purposes. If an aircraft in operation by a carrier ceases to conform to its type certificate, an action against the airworthiness certificate should be available.

4. There are some serious technical deficiencies in the ATA bill. The bill would authorize the prescribing of standards only for "the measurement of aircraft noise and sonic boom". It will be necessary not only to establish standards for the measurement of noise but also to prescribe allowable noise emission levels which aircraft must meet. Measurement alone is insufficient. We also think the finding required to support the standard, that it is "necessary and appropriate to encourage progress in aircraft noise abatement", is too vague. We think the objective is to control and abate aircraft noise and this should be the finding necessary to support a standard. Of course, in any rule-making action, the test of reasonableness will also be present.

ATA expressed concern about the proced
tection of H.R. 3400. It is clear that sec
(which provides for appeal to the courts of
by the Board) will apply to actions taken
certificates for reasons of noise abatement
boom under the proposed section 611. We be
unnecessary to repeat the provisions of sec
in section 611.

In summary, the Department would suppo
which (1) authorized the Secretary to prese
amend standards for the measurement of
noise and sonic boom, and to prescribe sta
rules, and regulations as necessary to provide
control and abatement of aircraft noise a
boom; (2) authorized the Secretary to appl
standards, rules, and regulations to the issuan
aircraft type certificate, regardless of the dat
application for the certificate; (3) authori
Secretary to amend, modify, suspend, or revo
certificates and airworthiness certificates for
sonic boom purposes; and (4) authorized the N
Transportation Safety Board to amend, modi
reverse an order of the Secretary on a finding
control and abatement of aircraft noise or soni
and the public interest did not require affirma
the order. A bill incorporating these features wo
acceptable to the Department and would be
consistent with the position taken by ATA.

The Bureau of the Budget advises that fr
standpoint of the Administration's program th
no objection to the submission of this report
consideration of the Committee.

Sincerely yours,

JOHN L. SWEENEY,
Assistant Secretary for Public Af

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